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CONTENTS

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FRANK W. GRINNELL.

Sworn to and subscribed before me this 12th day of March, 1929.

William H. Agee,
Notary Public.
(*My commission expires Aug. 4, 1933.*)

[seal]

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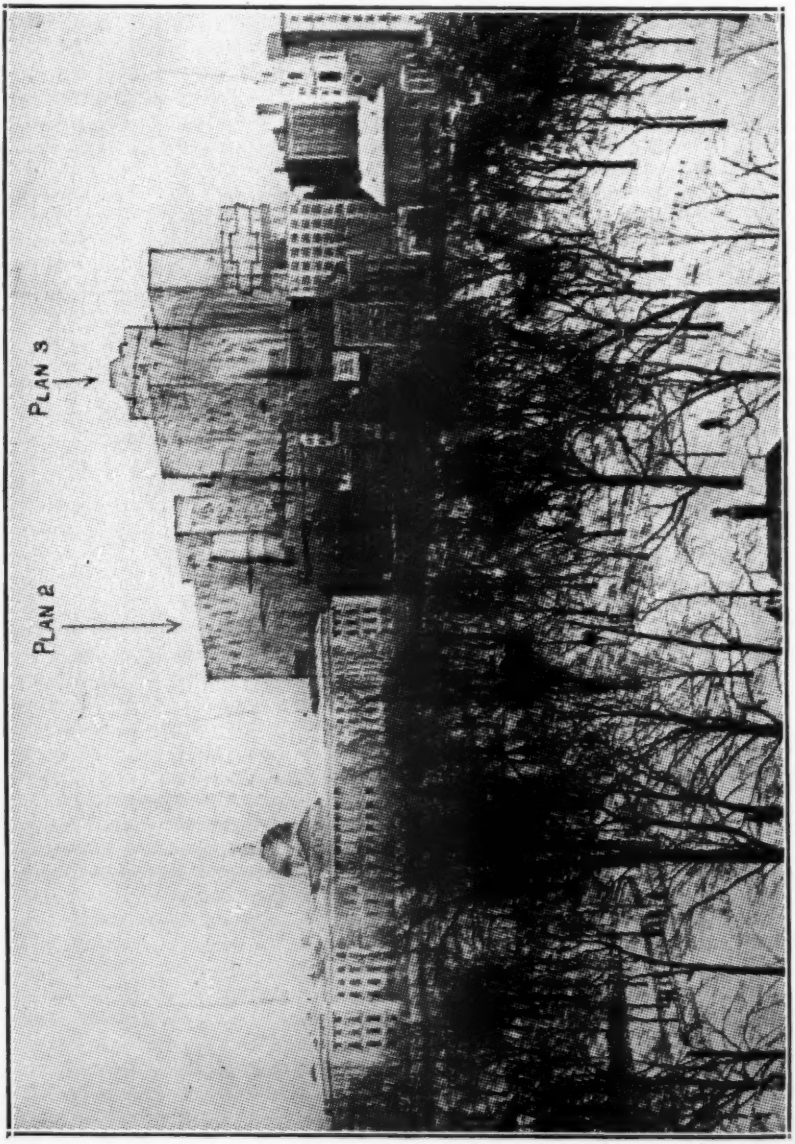
DOES MASSACHUSETTS WANT THE SUFFOLK COUNTY COURT HOUSE TO DWARF THE STATE HOUSE?

The photograph taken for the Council of the Boston Bar Association shows how the "Tower" plan of extending the Court House vertically (Plan 3) and the Ashburton Place plan (Plan 2) would affect the appearance of the State House. The Council favored a modification of Plan 1 which would rise from the lower level of Howard Street with a height limit of 155 feet.



NINETEENTH ANNUAL MEETING.

The nineteenth annual meeting of the Massachusetts Bar Association was held in the rooms of the Boston Bar Association in the Parker House in Boston, on Thursday, November 22, 1928.

The Association met at 2:30 P. M., with about forty members present and the President, Mr. George R. Nutter of Boston, in the chair.

THE PRESIDENT.—The first business is the reading of the records of the last meeting.

SECRETARY GRINNELL.—The records were printed in the February "Quarterly" and I move that the reading be dispensed with unless somebody wishes them read.

[The motion was carried and the records declared approved.]

REPORT OF THE EXECUTIVE COMMITTEE.

There have been three meetings of the Executive Committee during the year which have been well attended,—one on March sixteenth, one on June fourteenth and one on November fifteenth.

Upon the question of establishing a Committee on Legal Aid which was referred to it by vote of the association at the annual meeting of 1927, after preliminary consideration by a sub-committee,

IT WAS VOTED that a Committee on Legal Aid be appointed by the president, the number to be determined by the committee, and that the committee shall work out its own course of action until further action by the Executive Committee or the president of the association. The president subsequently appointed the following members to this committee,

Raynor M. Gardiner of Boston, *Chairman*,
Charles B. Rugg of Worcester,
James M. Rosenthal of Pittsfield,
Horace E. Allen of Springfield,
Harold S. R. Buffinton of Fall River.

The expediency of a plan of state annotations of the restatements of the American Law Institute of Massachusetts similar to

the plan now being tried in Michigan was referred to a sub-committee for report and the report of this sub-committee recommending that the plan be tried by the preparation of Massachusetts annotations to the restatement of contracts has been received and considered, and

IT WAS VOTED that a committee consisting of the president, the secretary and R. S. Wilkins, Esq., of the Executive Committee be authorized to arrange for the preparation of Massachusetts annotations of the restatement of the laws of contracts and to plan for their distribution in such way as they deemed best within the means of the association.

At the March meeting,

IT WAS VOTED to support House Bill No. 987 to provide increases in the salaries of the justices of the Supreme Judicial Court, Superior Court and Land Court. The secretary was directed to notify the committee of the legislature of this vote.

In view of the number of bills relating to federal courts and practice IT WAS VOTED that a Committee on Federal Legislation, Procedure and Practice be provided for of seven members to be appointed by the president, its function to relate to these matters as they affect the administration of justice and practice of the courts; the committee to exercise discretion as to the specific subjects which it shall take up by action and to have power to act by its own initiative in relation to the topics within its provision above indicated. The appointments to this committee will be made by the incoming president of the association.

IT WAS VOTED that the president appoint a committee of not more than five to consider the whole subject of admissibility of evidence illegally secured in the state and federal courts and report any recommendations to the Executive Committee. This committee has not yet been appointed.

The office of assistant secretary was created and the president and the secretary were authorized to appoint an assistant secretary and to incur such expense as they deemed wise for clerical assistance. Dunbar F. Carpenter, Esq., was accordingly appointed.

As the result of the very effective work of the Committee on Membership, 268 new members of the association have been added during the year.*

The Executive Committee recommends the changes in the by-laws of the association printed in the notice of the meeting.

* A new printed list of members will be issued later in the year.

At a meeting on June 14, 1928, the proceedings of the legislature in relation to Mr. Arthur K. Reading while attorney general were considered. After discussion

IT WAS VOTED that the president be directed to transmit to the Committee on Grievances the report of the investigating committee of the House and other documents relative to the conduct of Mr. Reading in the office of attorney general for the consideration and recommendation of the Committee on Grievances.

At the meeting on November 15, 1928, the Grievance Committee reported that as requested by the Executive Committee it had considered the proceedings in the case of former Attorney General Arthur K. Reading; that a sub-committee of the Grievance Committee was appointed in June, 1928; that the sub-committee examined the printed documents in the Reading case, namely, House No. 1339, "Report of the Special Committee of the House of Representatives, etc.," House No. 1342, "Statement of Representative James, Chairman of the Special Committee" (on presenting the resolution to impeach Mr. Reading), and House No. 1344, "Articles of Impeachment"; and that the sub-committee also read a large part of the stenographic record of the proceedings before the Special Committee of the House; that as a result of their examination the sub-committee were of opinion that public interest demands the presentation of all the facts to the court for such action as it shall deem proper; that the report of the sub-committee was presented to the Grievance Committee at a meeting on November 7, 1928, and that after very full discussion that committee without hearing any witnesses adopts the report of the sub-committee and refers it to the Executive Committee for such action as it, after investigation or hearings, shall deem proper.

The report was considered and after full discussion

IT WAS VOTED that the president of the association be requested to ask Mr. Reading if he desired to show cause why the facts relating to his conduct of the office of attorney general should not be laid before the court for inquiry.

Mr. Thomas J. Hammond, of Northampton, a member of the Executive Committee, was not present at the meeting and took no part in the discussion. In view of Mr. Hammond's connection as counsel to the special committee of the House, with the proceedings against Mr. Reading, he felt that he should not attend the meeting at which this subject was to be considered.

THE SECRETARY.—The President subsequently, in accordance

with that vote, notified Mr. Reading and asked if he wished to be heard as stated in the vote, and the Secretary received a letter from him stating that he would like to be heard. That is the latest news on the subject.*

[The report of the Executive Committee was accepted and placed on file.]

THE PRESIDENT.—The next business will be some comments by the President upon the doings of the Association in the past year and possibilities for the future. It is needless for me to say that these opinions belong entirely to the President and do not commit anybody except him.

THE PRESIDENT'S ADDRESS.

To the Members of the Massachusetts Bar Association:

The report of the Executive Committee tells you of the activities of the Association during the past year. I desire to submit, for your consideration, some comments upon these activities, and to point out possible courses of action which, I believe, lie before us.

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* Subsequently, on March 23, 1929 (following the practice explained by the Court in the Casey case 211, Mass. 187, at pp. 191-193), by vote of the Executive Committee the following presentation was filed in the Supreme Judicial Court for Suffolk County.

> "The Massachusetts Bar Association by its President, Frederick M. Mansfield, in accordance with the vote of its Executive Committee, respectfully represents:
>
> that on June 5, 1928, the House of Representatives for the Commonwealth of Massachusetts directed a special committee thereof to prepare articles of impeachment against the then Attorney General, Arthur K. Reading; that on June 6, 1928, said Reading transmitted to the General Court for this Commonwealth his resignation from the office of Attorney General; that on June 8, 1928, said special committee reported articles of impeachment against said Arthur K. Reading as Attorney General, House 1344; that on June 13, 1928, said House of Representatives adopted a Resolve, House No. 1348, discontinuing said proceedings. (A copy of said articles of impeachment and also one of said Resolve are filed herewith.)
>
> Said Association respectfully calls the attention of this Honorable Court to the entire matter for such action, if any, as the Court may deem expedient in the premises."

The Court, in accordance with St. 1924, c. 134, designated Frederick M. Mansfield, Esq., and Dunbar F. Carpenter, Esq., to conduct the proceedings.

I will begin with the internal organization of the Association itself. We need more members. Up to the present year the Association has never had a thousand members, and the largest number we have added in any one year—so far as one can figure by the records—is ninety-eight. This year the Committee on Membership has added 269 members and we have a total of 1,136 members. This is an admirable performance, for which the Committee is entitled to great credit. In my opinion, however, it is only the beginning. There are at this Bar of the Commonwealth approximately eight thousand members. Certainly it is very modest to say that we ought to have at least twenty-five per cent, or two thousand of them. We ought to have many more, but it would be perhaps enough at present to set before ourselves the definite standard of two thousand. The payment of dues of five dollars a year is a very little tax, particularly when you take into account that each member receives the "Massachusetts Law Quarterly"—which has now become one of the best edited law magazines of its kind in the country. Any member of the bar who has no office in the city of Boston may become a non-resident member of the Bar Association of the City of Boston, for another five dollars, and so have the use of the rooms of the Association, in the Parker House. The entire Bar of the Commonwealth, therefore, may enjoy a common meeting-place. Thus united we may go forward in solid ranks to perform what lies before us.

The Executive Committee meets under natural difficulties because its members come from all parts of the Commonwealth. We have, however, arranged to hold quarterly meetings—during the past year—and to have certain portions of the work in charge of sub-committees, to be performed between the meetings.

Meetings of members, however, present a serious problem which we ought to consider and to solve. Heretofore, we have had an annual meeting, held each year in a different part of the Commonwealth. The idea which underlies this method of meeting is sound. It of course stimulates local sympathy with the work of the Association to have the meetings held in the different county towns, but it likewise presents a good deal of difficulty. Autumn is not always the pleasantest time to visit some parts of the Commonwealth, and it is difficult to get many members to attend. The result is that our meetings, however enthusiastic, are rather small. I suggest, for your consideration, two meetings a year; an annual meeting held in the city of Boston, in the autumn, at the same

time that the Bar Association of the City of Boston holds its Bench and Bar Night, so that we may unite with them on that occasion. This brings together the entire Bench and Bar of the Commonwealth on one day in the year, and I think it is a significant and important event that there should be one day set apart when all of us may meet. It seems to me quite possible that there should be a second meeting in the spring of the year, which, in all parts of our Commonwealth is as lovely a time as we could come together, and that on that occasion we may perhaps devote ourselves a little more to the lighter side. This suggestion may be worthy of your consideration.

The By-laws of the Association provide that the term of the office of President shall be one year. The suggestion is made to alter the By-laws in that regard, so that the President may serve for a period of not more than three years. It is particularly fitting that I, who am the last to serve under the present By-laws, should comment upon any possible change. I am strongly of the opinion that the term of the President of any association should not be limited to one year. From my service as your President, as the President of the Bar Association of the City of Boston, and as the President of the Boston Chamber of Commerce, I believe that one year is altogether too short a term. It takes one year for anyone to realize what are the problems of the organization of which he is the presiding officer, and if possible what solution can meet those problems. It takes certainly another year—particularly with an association which is as cumbersome as ours—to set on foot any possible solution, and a third year may be necessary to bring anything to a respectable conclusion. I hope, therefore, that the amendment to the By-laws may receive favorable consideration, and that the term of my successor may be lengthened.

If then we have a President whose term of service may be not exceeding three years, an Executive Committee which may meet at stated periods, with its work performed by sub-committees—and particularly by committees which may include members of the Association who are not members of the Executive Committee, and so diffuse more general interest in our work; an increase of membership to two thousand, or twenty-five hundred; two meetings a year, one an annual meeting in the autumn, with the Bar Association of the City of Boston in its Bench and Bar Night, and the other in the spring, in some other part of the Commonwealth; with certain methods for arousing and maintaining interest on the part

of the members to which I shall allude later; we are organized, I believe, with reasonable effectiveness to carry on our work.

Let me now allude to some things before us. I believe that as a Bar we are quite provincial. By that I mean that we attend pretty closely to the little narrow circle of our own professional interests, and do not often look beyond it. Few of us see farther than the Hudson, and few of us, at least in any organized fashion, realize that there is such a place as Washington. It has always seemed rather queer to me that neither in this Association nor in the Bar Association of the City of Boston, is there any committee on Federal Legislation and Procedure. Yet there never has been a time when Washington was moving into the legal arena as it is now. Certain subjects of Federal jurisdiction, e. g. admiralty and patents, are of course rather limited in their appeal. On the other hand, two have very greatly increased in our time; one is the subject of bankruptcy, which has now been administered under the National Bankrupt Law for so long a period that it seems a settled policy of the Federal Government; the other, is the matter of taxation, which is here to stay. There are, besides, common law procedure and procedure in equity, which are capable of great improvement. Criminal procedure is in great need of simplification and efficiency. Matters involving some one or more of the foregoing, are constantly before Congress. Let me cite only three examples.

The first, is the Caraway Bill, Senate Bill 1094, which has been before Congress for some time, which seeks to forbid a Federal judge from commenting upon the facts, in any charge to a jury. We all know that historically, the judge had this right. It has been taken away from him in many of our states, due to the foolish idea, as it seems to me, that the judge should be hemmed in as much as possible, and reduced merely to a kind of umpire between the conflicting parties. Why the only man in the courtroom who is really supposed to be skilled, and to be as impartial as possible, should be forbidden to give any assistance to a jury, and they should be left entirely to the oratorical efforts of counsel, is to me an anomaly. Whether the Caraway Bill would be constitutional, if it ever came before the Supreme Court of the United States, is not now the question; it ought not to pass.

The Norris Bill, Senate 3151, seeks to abolish the jurisdiction of the Federal courts arising from the diversity of citizenship.

There has always been, on the part of the debtor states—chiefly in the west and south—a wish to avoid the United States courts, and to compel all suitors of other states to enter the state courts. It seems of importance to our business interests here that this jurisdiction should not be done away with.

Olmstead v. *U. S.*, 48 Sup. Ct. Rep. 564, known as the "wire-tapping" case, is the third example. The question there, as you know, was whether evidence which had been procured by prohibition agents of the Federal Government, by violation of the state law through tapping wires, might be admitted in a criminal trial. The court divided, the majority holding that it was admissible, and the minority—among whom were the two justices from Massachusetts—dissenting. Without undertaking to comment upon the legal principles invoked by either side, and assuming that the case is now settled law, I believe the result to be extremely unfortunate. Respect for government lies at the foundation of any successful experiment in democracy. It is impossible to have any respect for a government whose officials in enforcing the law are permitted to obtain evidence by violation of the law. As Mr. Justice Holmes, characterizing the performance as "dirty business", remarked, with his usual pithiness, "it is less evil that some criminals should escape than that the Government should play an ignoble part." It is true that one of the cases cited by the majority is a Massachusetts case. The world, however, moves—even in Massachusetts. I think that in all the welter of opinion regarding the Eighteenth Amendment and the enforcement of the Volstead Act, there is at least one thing upon which we may insist, and that is that those who seek to enforce the law, shall themselves obey the law; otherwise, where will this practice end?

I hope I have pointed out enough to show that the doings at Washington concern us very deeply, and that it is highly desirable that this Association should have a committee dealing with Federal Legislation and Procedure. The Executive Committee has had this matter under consideration, and has constituted such a committee. It will be quite possible, by combination with other Bar associations and perhaps Chambers of Commerce, to establish some agency in Washington constantly on the job, which would keep us advised of what is going on, bring us up to date, and enable us to say something with regard to matters which affect our business and legal interests. I recommend that active attention be given to this subject.

Let me now turn to an entirely different matter; the scholarly interests of the Association. We have now had for many years the "Massachusetts Law Quarterly". As I have already said, it is one of the best edited magazines in the country, and something of which I believe we may all be proud. It alone is worth all the effort that it takes to maintain this Association.

At the same time, I believe that we may greatly extend our influence, and maintain the interest of our members by other efforts in the publication line. I feel that a bulletin, issued perhaps every fortnight, and during the winter, while the legislative session is on, every week, would keep our members alive to what is actually going on, instead of having them find out at the end of the year, by the report of some committee, about what has gone on. This is particularly applicable to the hearings before the Joint Judiciary in regard to the various bills affecting procedure. It would be quite possible by combination with the Bar Association of the City of Boston, for the two Committees on Amendment of the Law to issue a joint bulletin of this kind, and keep us all informed. In this way our members would be kept advised of the happenings of the year, as these happenings were going on, and at the same time, every quarter would have the opportunity of reading more serious and well-developed articles in the "Law Quarterly".

The Executive Committee has decided to enter upon the experiment of annotating with Massachusetts cases for the use of the Massachusetts Bar the Restatements of the Law as issued by the American Law Institute. This is a scholarly undertaking, and your interest and support are quite worth while. Along the same line it has been a hope of mine for some years, that eventually one or the other of these two great Bar associations of this Commonwealth might undertake the publication of brochures dealing with particular points of Massachusetts law, or with particular matters which would be interesting to Massachusetts lawyers. The offering of an annual prize of a fair amount, might result in the production of compilations of this kind, which would not only be encouraging with regard to scholarliness, but would also be of use to the practicing members of the Massachusetts Bar. Perhaps someone who has a surplus from his practice might establish something of this kind. Furthermore, portraits and prints of members of the Bench are always interesting historically.

Finally, there is a publication about to appear, which I know will interest us all. Two years ago, in an address at the Bench

and Bar Night before the Bar Association of the City of Boston, Nathan Matthews pointed that the old Colony Code of 1648 had never been published. There was, in fact, only one copy of that code in existence. It had heretofore been in the hands of collectors who would not allow its publication. Finally it came into the hands of Henry E. Huntington, in California, in the great library which he has there assembled. Matthews urged us to try to obtain the publication of this code, which he declared to be the first compilation of laws since the time of Justinian, and which contained the germ of some of our present legislation. As President of the Bar Association of the City of Boston, I appointed a committee for that purpose, of which naturally, Matthews became the Chairman; but his lamented death left the work undone. You will be interested to know what has happened since then. Huntington died and left his great library in charge of trustees, with Professor Max Farrand, formerly of Yale University, as the director. I have taken up with Dr. Farrand the publication of this code. I told him that I believed that there was sufficient interest, on the scholarly side of this Bar, to support such a publication, and that I felt no hesitancy in guaranteeing to him a thousand dollars, at least, in the way of sales of the Code when it appeared. I am now happy to announce to you that by arrangement between the trustees of the Huntington library and the Harvard University Press, a series of publications of the rare works of the library will come forth, and that the first of these is to be the Code of 1648. My only regret is that Matthews did not live to see this publication, but "what he sowed, we reap."

Another important subject before us is the requirements for admission to the Bar, and the corresponding subject of disciplinary measures over members of the Bar. As we all know, the requirements for admission are in a very unsatisfactory condition. After the unfortunate rumpus in the Legislature, years ago, they have remained in precisely the same state as was then established. The requirements in general education are only those of two years in a day or evening high school, and even a modest little bill to omit the evening high school, met with no success in the last Legislature. While we stood still, there has been an advance in other parts of the country. In 1921, the American Bar Association adopted the policy that an acceptable law school should require as a condition of admission at least two years of study in a college. I should hardly expect the Commonwealth of Massachusetts to

recognize this amount of general education as a requirement for admission to a learned profession. In other states, however, the requirements are constantly advancing. During the last two years, fifteen states have increased their requirements for admission into the legal profession, but Massachusetts has not made any progress, and now cannot be classed among the progressive states, or even in the upper half of the states. The only argument that can be brought forward to excuse an advance in educational requirements, is really of a pretty poor sort. It is said that it excludes deserving persons who perhaps cannot afford the time for education for admission to the Bar. In the first place, this argument is entirely wrong, because of its wrong point of view. It is not the lawyer who is to be considered, but the public; and it is not for the interests of the public to have an ill-trained Bar. In the second place, in this community, it is perfectly possible for anyone to obtain the necessary educational advantages, if he really wants so to do. I believe that the Association should continue its efforts to have this whole question of requirements for admission placed where it belongs, in the hands and under the supervision of the Supreme Judicial Court.

Even under the present requirements, there are, in my opinion, changes that could be advantageously made. The Committee on Legal Education, of which I have made myself the Chairman, is considering such possible changes, and I shall hope that we may present them in a reasonably short time. At all events, there is no need to discuss them now.

The subject of disciplinary measures is also in an unsatisfactory condition. I see no reason why Bar Associations, which after all are merely private aggregations of lawyers, should be compelled to look after this question of discipline. It is, after all, the duty of the Commonwealth, if it requires standards for admission, to see that the standards of the profession are kept up and complied with. There is a certain irony, which if it were not irritating would seem delicious, that the Commonwealth should prescribe such low standards of admission as to fill the Bar with ill-trained lawyers, and then expect the Bar Associations to bring proceedings to disbar those who never should have been admitted in the beginning. I believe that the Bill introduced some years ago, which placed the disciplinary measures in the hands of officials appointed by the Supreme Judicial Court, should be passed. It is in successful operation in the state of Washington. This will not relieve the

Bar Associations, so far as the Grievance Committees are concerned, for there will always have to be Grievance Committees; but it will be a recognition by the Commonwealth of its duty in the premises and will put the responsibility—to say nothing of the expense—where they properly belong.

The whole subject of admission and expulsion demands constant and vigorous attention. In my judgment, the Bar has deteriorated in the last forty years, and is deteriorating now. An ill-trained Bar is a poor thing for the community; it is a poor aggregation from which the judges are to be chosen and it is detrimental to the public good.

This discussion of disciplinary measures brings up at once a concrete case occurring during the last year. This is the matter of compulsory insurance rates, where it was alleged by the Insurance Commissioner that many fraudulent claims were prosecuted by undeserving members of the Bar, and that in consequence, the rates would have to be advanced. The subject first came up in a public address by the Insurance Commissioner, on May second, last, before some association. I at once wrote to the Commissioner, and told him that if he had any cases of fraudulent conduct, the Bar Association would act—if evidence could be produced before it. As a result, there was considerable discussion, and eventually the whole matter was placed in the hands of the Attorney-General, at a conference of the various state officials, at which I was present. When the Attorney-General has come to any decision, it may be necessary for the Bar Association to take action. In the meantime, we await the result of this investigation. Of course there have been investigations into fraudulent practices in New York, and in Milwaukee, and I think elsewhere. In those instances a general petition was filed in court, under which a complete omnibus investigation was made. Whether that is necessary here or not, remains to be seen. At all events, we have kept in touch with what is being done elsewhere, with a view to any action here.

This subject of compulsory insurance rates is, however, vastly broader than the mere question of whether there are or are not fraudulent practices among members of the Bar in pushing automobile accidents. In fact, the whole subject bids fair to be of wide importance in its various ramifications, and I have no doubt will be considered at length in the coming Legislature.

In any consideration of the subject, there are at least three elements which must be considered. These are compensation, fraudulent practices, and congestion of the courts.

More important than the other two, and to some extent including them, is the question of compensation in cases of automobile accidents. This great problem of motor traffic has arisen in the last twenty or twenty-five years; our streets and roads are now filled with upwards of eight hundred thousand motor vehicles of all kinds, and the number of deaths and accidents resulting, is appalling; it is something with which the community must grapple in all its ramifications, and the Compulsory Insurance Act was the first attempt at the compensation end of the problem.

So far as that Act is concerned, if it is to be kept in force, there are at least two changes which at once come to mind. In the first place, the determination of rates ought not to be left to the decision of a single individual. The result last summer clearly demonstrated that. In general, the determination of railway rates, public utility rates, and matters of that kind which affect the public, are determined by a board. In the second place, there should be a better organized opportunity for the public which has to pay the bills, to be heard on their establishment. There should be a full and complete hearing on the subject. In such a hearing the allegation of Governor Fuller that the commissions are altogether too high should be investigated. When you take into consideration that the Savings Bank insurance is reported to be furnished to the public at an average saving of over twenty-six per cent over the furnishing of insurance by mutual and old-line companies, there certainly seems to be some need for looking closely into these rates which all motor vehicle owners must pay.

Various schemes will undoubtedly be proposed this winter in the Legislature by which compensation should be effected, and bills have already been introduced, treating of the subject. Of course some of them contemplate state insurance, some the organization of methods analogous to the Workmen's Compensation Act. It has been suggested that the analogy to the Workmen's Compensation Act should be worked out very carefully and the money involved paid by the automobilists themselves by an extra tax upon gasoline.

This question of compensation is the chief element in the three I am presenting, and, as I have said, the methods adopted in solving the question of compensation may have an important effect upon the other two elements, to which I next draw your attention.

The next element is the prosecution of fraudulent claims by members of the Bar. This involves the whole question of solicitation of claims, contingent fees, contingent medical expenses, and

all the other unfortunate attributes which we now connect with tort matters. There is no doubt that something must be done with regard to contingent fees. It is, of course, impossible to say how much solicitation of business is now indulged in by the bar. I have been informed that in 1927 twelve lawyers presented claims, not of course always resulting in suit, to insurance companies arising largely out of the Compulsory Insurance Act, to the following number: 408, 359, 348, 183, 177, 160, 148, 120, 107, 97, 95, 55.

This makes an average for each of these twelve lawyers of 188. It may well be that these claimants retained counsel through a species of divine inspiration without any solicitation, but from the reputation which these twelve enjoy among their brethren of the bar it seems unlikely. The fact is that there is probably working with us the usual tort trinity of the shyster lawyer, the shyster doctor and the shyster runner. Whether it has been developed with the same artistic skill as elsewhere it is impossible to say, but local pride compels us to believe that we are not surpassed in ingenuity. The latest improvement that has come to my attention in tort claims is the clientless lawyer, who has never been authorized by anybody to bring suit. Several suggestions have been made to remedy the evils, notably the proposed statute by Justice Wasservogel, in New York, and the various rules of court suggested in Philadelphia. It ought to be possible to work out a satisfactory solution of these evils of solicitation and contingent fees, not perhaps so as to destroy them entirely, but greatly to minimize the practice, protect the public and lessen the scandals.

The third element is one to which not enough attention has yet been given; that is, the congestion of the courts. The great increase in automobile accident cases is proving a serious matter. If everybody to whom some accident has come, no matter how slight, is to have an opportunity of trying out his case before a jury, the Superior Court will soon have nothing else to do. I dislike to contemplate a situation in which, on its criminal side, the court will be devoted to liquor cases, and on its civil side, to automobile accidents. There seem to be other rights, as between individuals, and as between the Commonwealth and individuals, which ought to have some chance in the courts. Some method must be devised for the relief of the courts in these cases.

I merely point out the elements which seem to me to enter into this whole subject, and to make it—as I have said—very broad and comprehensive. I do not undertake to point out any remedies.

In the first place, I am, of course, not competent to point out remedies; it will take a great deal more study than I have given to the subject, and many meetings of minds, before we can arrive at any conclusion. In the next place, I should not want rashly to anticipate anything which might be said by the Judicial Council in its coming report. I understand that the Judicial Council has had under consideration the different elements of this problem for some time; that in its report, which will come about the first of December, they will all be set forth and discussed. As a result, the whole subject will undoubtedly be taken up during the coming term of the Legislature. I feel that the Massachusetts Bar Association ought to be in a position to take a hand in this discussion, and to contribute toward the proper solution. Very likely the Committee on Legislation might be the proper body to represent us on such an occasion, but if their work is already too onerous, there should be a special committee appointed for the purpose.

I have pointed out to you a few of the matters which seem to me to be immediately pressing upon us; there are many others with which I shall not weary you, but which, I have no doubt you will learn as time goes on, from my successors. Let me close with presenting for your consideration one general matter.

I believe the most important subject now before the Bar of this country—certainly before us, here in Massachusetts,—is research in procedure—both criminal and civil. By this, I mean the scientific study of means toward the end that the citizens may have a simple, inexpensive, and speedy method of administering justice. This is accomplished, in the first place, by a study of what is being done elsewhere; and in the second place, by a careful consideration of how far new methods employed in other communities may be grafted upon our own system. We do not want to be led astray by the thought of virtues elsewhere, so as to lose the virtues we have here. Some things admirably fitted for one community, may not in the least appeal to another.

The need for such research study is seen when you take our present system. For example, take the question of crime. Some years ago, the Legislature held what was known as Crime Week, at which various matters involving criminal procedure, were discussed and considered. At that time, the Bar Association of the City of Boston presented through a committee, of which I was the Chairman, some considerations for the Joint Judiciary Committee. We called attention to the many elements entering into the whole

subject of crime. These were, the causes of crime—which of course involve sociological study; the detection of crime—which involves the police; the prosecution of crime—which involves the District-Attorney; the trial for crime—which involves criminal procedure; and in particular, the jury system and the choice of jurors; the system of sentences, and the whole system of probation and parole. We pointed out the lack of coordination between these different elements, and suggested that it might at least be worth consideration whether there might not be established a coordinating agency—similar to the Judicial Council—which could take cognizance of all of them and see what ought to be done in perfecting them. We suggested that a commission might be appointed to study the whole question of crime, and bring in some comprehensive report. The Legislature did not see fit to adopt this suggestion. Some statutes were passed, as a result of Crime Week, which were well enough so far as they went, but simply scratched the surface.

Later, the Sacco-Vanzetti case showed serious imperfections in our methods of administering justice. There were in that case two questions which were legal in their nature. The first, was whether there had been a fair trial; and the second, was whether on the weight of the evidence, there should have been a conviction. In those jurisdictions where a criminal court of appeals had been established, these matters would have been considered by the court, and there would have been a satisfactory review of them, and a decision rendered. In our procedure we had no such agency, but the whole matter was left to the Governor, who practically was in the position of the Home Secretary, prior to the English Act of 1907, constituting the Court of Criminal Appeal. We take satisfaction that Governor Fuller fulfilled his duty faithfully; but those questions never should have been submitted to him. They were questions which should have been determined in some way by the judicial system itself. Yet we have not been able to put through a court of criminal appeal.

The result is, that the whole subject of crime has been very inadequately treated in this Commonwealth. However you look at it, we certainly are not treating it in a way in which an advancing community ought to treat it.

The same situation exists on the civil side. We have, in our civil procedure, two extremely good basic elements. The first, is the appointment of our judges; they are not selected by the helter-

skelter method of an election, much less by the absurdity of a popular primary. On the whole, the system works extremely well. We have not enough cleverness to treat our judges very well, either in the way of salary, or in entrusting to them some freedom in the conduct of their matters—both in the way of rules, and otherwise. But the type of judge still remains with us—subject of course to human limitations in every case—of a very good kind, and our governors always approach the subject of a judicial appointment with a due regard to their responsibility. The second thing we possess as a matter for congratulation, is a simple, elastic, and on the whole satisfactory Practice Act. Through some kindness of Providence, we escaped involving ourselves in the network of a code.

When, however, we go further than these two basic things, we have not much reason for congratulation. Our courts are congested; we have no special juries for the consideration of special cases; we are struggling with the selection of jurors in large cities; we still deal in archaic rules of evidence; we hem in our judges and do not allow them to charge the juries, as in the historic fashion; our proceedings before masters and auditors rival *Jarndyce* v. *Jarndyce;* our bills of exception are wonderful productions, our system of municipal and district courts remains the result of historical confusion, although our District Judges have developed admirable co-operation and have demonstrated their fitness for a broadening of their powers and jurisdiction. We lack the development of discovery; the rule for issues; the adaptation of our courts to modern requirements. The various matters which elsewhere mark the difference between 1850 and 1928 are somewhat lacking in Massachusetts; here the dates are contemporaneous. This is not the fault of the judges, many of them are good administrators, and quite alive to the necessity of administration. It is very largely the fault of the system.

There has been some recognition of the situation, and progress has been made in constituting the Judicial Council. In Massachusetts, the Judicial Council first had its birth, and it has here been carried on in a way which makes it an example for the rest of the country. The whole system of judicial councils has greatly increased, and there is a very great deal of hope in their future.

At the same time, I have a good deal of doubt whether we shall arrive at a satisfactory conclusion except by a thorough substitution for the system itself. It is a question, whether you can

tinker it and make it any more effective. I believe that the Judicial Council, had it the time, or a small special commission, could sit down and with the aid of some experts in research—finding out what is done elsewhere—construct a system very much in advance of what we now possess. Whether, however, after you got it constructed you could ever get it adopted, would be quite a different question.

This presentation of our procedure may not seem to you very cheerful, and in fact somewhat pessimistic. Cheerful it is not; it is not intended to be; pessimistic, however, I do not think it can be characterized, because we have the possibility of bettering it.

My purpose in presenting it, is to ask you to give it consideration, and after you have set aside your prepossessions in favor of what is, and think a little of what might be, I believe that you will agree with me; if so, we shall realize the situation.

I suggest as practical methods for remedying this practical situation, two things. In the first place, I heartily believe in the suggestion made by the Committee on Legislation, that there ought to be something done to bring the recommendations of the Judicial Council into effect. They are an advisory body; they give a great deal of time and attention to these questions; they present to the Governor, and through him, to the Legislature, what they think will help our judicial system. But they cannot go any further, we do not want to see them trying to lobby their recommendations through; they cast them on the air, and if they take effect, all right; if not, it is not their province to do anything more than to point out what might happen. It is up to us, I think, to make sure that these recommendations are adopted—so far as we believe in them. For that purpose, I think that there ought to be a committee to help carry these recommendations through the Legislature. Whether the Committee on Legislation can do this or not, may be a question; but either that committee or some other committee ought to give some real definite work to putting these recommendations into real effect.

In the second place, I think that it would greatly aid, in carrying these recommendations into effect, and in general, in improving our judicial system, if we could enlist the interest and cooperation of laymen. You will remember that all the improvements in English procedure were brought about largely through the work of laymen, and through the great newspapers and magazines of the United Kingdom. Here with us, for some reason, there seems not

to have been the same interest. The lay-people seem to accept defects in judicial procedure as an imposition of Providence with which they must be content. In fact, the whole question of judicial procedure is regarded popularly as a mystery by those who are not acquainted with it. They see the almost religious adoration which the Bar has toward the past, and they are inclined to agree that it must be sacrilege to change things which prevailed in 1850 under the regime of Chief Justice Shaw. I think effort ought to be made to show them that the law is a growing thing—not only in substance, but in procedure, and that it is greatly to their advantage to give some attention to it. They are the ones who furnish that class in litigation to which I think not sufficient attention is ever paid, either by Bench or Bar, namely, the litigant.

In the changes which are coming over New England, which anyone can see approaching, who does not shut his eyes, we want to have the judicial system keep step with advance in other directions. The great way in business is by research, and the same methods should be applied in law. As a matter of fact, administration differs very little, whether you sit in a court-room or in a factory. It is merely the adaptation of means to the end.

I should like to do away with that good old phrase, "the glorious uncertainty of the law," and substitute for it that ideal which old Dr. Johnson expressed, that "the law is the last result of human wisdom acting upon human experience for the benefit of the public." If we can combine wisdom with experience, and remember that the entire object of this whole system is the public, I think that we will feel encouraged to go forward and make it as perfect as it can be made within human limitations.

GEORGE R. NUTTER,
President.

Nov. 22, 1928.

CHANGES IN BY-LAWS.

THE SECRETARY.—As the quorum of thirty members, needed to act on proposed changes in the By-Laws, is present I would like to add to the report of the Executive Committee by reading what I forgot, and that is the reference to these proposed changes in the By-Laws which were printed in the notice of the meeting, and I think this is the proper time to take those up.

The first proposed change is in By-Law I, relating to membership. (The third paragraph was read.)

The recommendation is to substitute the following:

Any member in good standing of the Bar of Massachusetts may become a member of the Association upon vote of the Committee on Membership or of the Association, as hereinafter provided, and upon paying the dues of the current year as provided in Article XV of these By-Laws.

The reason for this change is to do away with the present cumbersome arrangement by which, after the Committee on Membership has acted, the names have to be submitted to the entire Executive Committee. Some years ago the By-Laws were amended in view of the difficulty of securing meetings of committees, the members of which were scattered all over the Commonwealth, and it was provided that the Secretary might submit proposed names to the committees by correspondence and after the lapse of seven days, if the specified number of negative votes were not received and a quorum of the committee was in favor of the candidate, the Secretary could add his name to the list of members. That is the way in which the election of members is now conducted. As you can see, with eleven members of the Membership Committee and twenty-five members of the Executive Committee to whom all nominations must be submitted, particularly this year when Mr. Bassett has been so active in securing new members, to submit these lists of so many names by correspondence is an unnecessarily cumbersome method of proceeding, and the Executive Committee felt that the approval of a Membership Committee of eleven members was a sufficient method. This proposal to eliminate the Executive Committee as a necessary approving body would be supplemented by the following paragraph, to be substituted for the fifth paragraph of the existing By-Law:

Nominations for membership shall be in writing, signed by one or more members of the Association, and addressed to the Secretary, who shall refer such nominations, by mail, to each of the Committee on Membership. Five negative votes in the Committee on Membership shall suffice to defeat an election, subject to the action of the Association as hereinafter provided.

If the votes of a quorum of the Committee on Membership are received by the Secretary, and of the votes thus received within seven days, less than five are in the negative, the Secretary may declare the persons thus voted upon elected to membership and enter them upon the roll of membership.

At the request of the sponsors of any candidate rejected by the Committee on Membership, the Secretary shall present his name to the Executive Committee or to the next annual meeting of the Asso-

ciation, and a ballot shall be then taken upon the question of admission. Five negative votes in the Executive Committee or fifteen negative votes in the Association shall suffice to defeat an election.

That is the whole of the proposed change in the first By-Law.

If there are any further questions about it I shall be glad to answer them.

[The amendment was adopted.]

THE SECRETARY.—The next change merely supplements that by an amendment of By-Law VII, to make it read as follows:

COMMITTEE ON MEMBERSHIP.

The Committee shall consist of eleven members. They shall consider and pass upon all nominations for membership, and their action shall be final, except where a nominee rejected by the Committee shall appeal to the Executive Committee or the Association as provided in Article I of these By-Laws.

[The amendment was adopted.]

THE SECRETARY.—The next change relates to a matter which the Executive Committee acted on in view of quite a large number of members coming in in the last quarter of the year. This is a proposal to ratify the views expressed by the Executive Committee, that where a member was elected in the last quarter of the year he should not be asked to pay the entire year's dues. The Executive Committee recommend that the year be divided into quarters and if a man were elected in the first quarter of the year he should pay the full dues, in the second quarter he should pay three-fourths, in the third quarter he should pay one-half and in the last quarter he should pay one-fourth. Accordingly it is proposed to amend By-Law XV to read as follows:

The annual dues shall be five dollars, payable to the Treasurer, on the first of January of each year, provided that new members elected during the first quarter of any year shall pay the full amount for that year, those elected during the second quarter shall pay three-fourths, those elected during the third quarter shall pay one-half, and those elected in the last quarter shall pay one-fourth of the full amount for that year.

Any member in arrears for more than one year may be dropped from the roll of membership by the Committee on Membership.

[The amendment was adopted.]

THE SECRETARY.—The last proposal is to amend By-Law II by

substituting the word "three" for the word "one" in the first sentence of the second paragraph, so that the sentence shall read:

> "No member shall be eligible for the office of President for more than three years in succession."

While the President would then continue to be elected each year as in the past, the proposed change, if adopted, would place the same limitation upon the number of successive terms as now applies to the Executive Committee and other committees, and the Executive Committee felt that this change should also be made. Mr. Nutter has already referred to the reasons for it in his statement.

[The amendment was adopted.]

THE PRESIDENT.—I think that clears the deck so that next year, which we hope will see admitted to the Association somewhere between five hundred and eight hundred new members, we can do the business of admission much more easily.

REPORT OF COMMITTEE ON LEGISLATION.

THE SECRETARY.—The next report, Mr. President, is that of the Committee on Legislation, which has already been printed in the "Quarterly" for August, 1928.

MR. PHILIP NICHOLS (Chairman).—Mr. President, as this report has been printed and it is rather long on account of so many topics that the committee had to consider. I suppose these topics will have to be discussed more or less, but whether it is the desire that I read it or not I don't know. I do not want to inflict it on the meeting unless it is so desired.

THE PRESIDENT.—If the Association agrees we might finish the rest of the business and then go back to this report.

THE SECRETARY.—The next committee is that on Judicial Appointments.

REPORT OF THE MASSACHUSETTS BAR ASSOCIATION'S COMMITTEE ON JUDICIAL APPOINTMENTS.

At the time this Committee was appointed, there was a vacancy on the Bench of the Superior Court caused by the death of Judge George A. Flynn.

On January 18th the Chairman wrote a letter to the Governor, giving the name and address of the Committee members and tendering to the Governor "such service of the Committee and its mem-

bers as you may request or suggest to aid you in the selection of the appointments to the Bench."

The Committee met for conference at the Parker House on February 11, 1928. It considered various members of the Bar for indorsement and recommendation by the Committee "as worthy and available for appointment to the Bench of the Superior Court." The Committee voted that the Chairman be requested to "present in person the names recommended rather than by letter." Thereafter the Committee by its Chairman presented in person to the Governor on February 28, 1928, the names indorsed for recommendation. The interview with the Governor was brief, very pleasant and obviously of no effect whatever.

Such is the complete report of the activities of the Committee on Judicial Appointments of the Massachusetts Bar Association for the year 1928.

E. H. VAUGHAN,
for the Committee.

Nov. 19, 1928.

The next report is the report of the Grievance Committee; Mr. Bell (Chairman).

REPORT OF THE COMMITTEE ON GRIEVANCE MATTERS MASSACHUSETTS BAR ASSOCIATION.

The Committee has held two meetings during the past year, but thanks to the activities of our very efficient Secretary, Raynor M. Gardiner, Esq., the meetings do not reflect the activities of the Committee.

The cases before the Committee during the past year are as follows:

Adjusted to the satisfaction of the complainant	6
Dismissed after investigation	17
Disbarment proceedings pending	1
Referred to the Executive Committee of the Association for action	1
Pending cases undisposed of	7
Total	32

The Committee has a feeling that, comparatively speaking, few complaints are brought to its attention due to the fact that people in general throughout the Commonwealth do not realize that this

Association stands ready to act on complaints against lawyers throughout the States excepting, of course, Suffolk and Middlesex Counties where the local Bar Associations attend to their own complaints. It may also be due to the fact that some of the local Bar Associations take little or no action on complaints and seem to be loath to refer cases to this Association which is really in an excellent position to handle these cases as it is entirely neutral and disinterested in the results.

Respectfully submitted,

STOUGHTON BELL,
Chairman.

THE PRESIDENT.—You have heard the report, gentlemen; are there any remarks to be made upon it?

MR. FRED L. NORTON.—Mr. President, at some time, whether now or later, as you may determine, I would like to ask a question of policy.

THE PRESIDENT.—Now is the time.

MR. NORTON.—I would like to ask whether the committee has adopted any policy with reference to cases where attorneys have, under the guise of fees, secured sums to which they were not entitled, and where, although it might be claimed by the attorney that the question was the mere question of the size of the fee, yet in fact there was evidence from which it might be determined that it was merely under the guise of a fee that a substantial amount of money had been obtained from the client on a misrepresentation as to whether there was or was not a case pending against him.

THE PRESIDENT.—Perhaps Mr. Bell can answer that.

MR. BELL.—Mr. President, that case is now pending before the committee.

MR. NORTON.—I knew it was—

MR. BELL.—The ordinary case that comes before the committee is a discussion between client and counsel as to the exact amount of the fee, and in those cases the committee has felt that since it was a discussion it was a matter which should be determined in the courts. But in this particular case that has come before the committee we have decided that where the representation by the complainant is that it is more than just a question of dollars and cents for services done—where, as in the case under discussion, there is a claim made that it is obtaining money by false pretenses—that it is up to the committee to take the matter and handle it.

MR. NORTON.—Thank you.

THE PRESIDENT.—Any further remarks?

JUDGE PRESCOTT KEYES.—I should like to inquire, Mr. President, what the relation of our committee is to the Committee for Suffolk County?

THE PRESIDENT.—I understand it is this—at least I have been acting on this assumption during the past year: that the Suffolk Committee deals with complaints against any member of the bar who has an office in Boston. There is a startling difference, of course, in the number of cases. I think the Suffolk Committee had over 500 cases last year; our committee has had thirty-two. The question in the Suffolk Grievance Committee is becoming very serious, because I think we are approaching the need for what they have in New York, namely, a corps of investigators and counsel who do nothing else but act under salary in dealing with complaints against members of the bar. That is the reason, among others, that I lay such stress on this question of admission. The Boston Association will this next year pay out between four and five thousand dollars for the privilege of trying to investigate or put out some of the people whom the Commonwealth lets in.

THE SECRETARY.—It has been the practice to refer Middlesex cases to that Association.

MR. BELL.—The Massachusetts Committee never takes action in any county without getting in touch with the local Bar Association and asking if they prefer to do it. But it is seldom, except in Middlesex and Suffolk, in my experience, that the County Bar Associations take action.

THE PRESIDENT.—I have always told people who applied to me as President of the Massachusetts Association that if the offender was in Suffolk—

MR. BELL.—We do not touch them in Suffolk—

THE PRESIDENT.—to go to the Bar Association of the City of Boston, but told them to go to our Secretary in other cases.

JUDGE KEYES.—My inquiry was entirely directed to Suffolk and not to Middlesex at all.

The report was placed on file.

REPORT OF COMMITTEE ON MEMBERSHIP.

The committee reported 268 new members since the last annual report.

ELECTION OF OFFICERS.

THE SECRETARY.—The report of the Committee on Nominations, submitted by Mr. Addison L. Green, is printed on the back of the call for the meeting and is as follows: [Reading report of committee.] The Secretary has received no other nominations.

(A ballot being taken the persons nominated were declared elected, as printed at the beginning of this number.)

We have forgotten the most important thing, the Treasurer's report.

REPORT OF THE TREASURER.

TREASURER JOHN W. MASON.—There was in the treasury at the beginning of the year:

On deposit in the Mechanics Savings Bank of Worcester.....	$2,725.71
Balance on checking account in Hampshire County Trust Co.	2,118.57
During the year we have had sundry receipts from the annual dinner, invested funds and for membership dues	5,073.06
Total	$9,917.34

I have here a detailed list of expenses which I will not inflict upon you at the present time unless you desire. The balance on hand is:

In Mechanics Savings Bank	$2,874.92
And in the checking account in the Hampshire County Trust Co.	1,122.50
Total	$3,997.42

[The report was accepted and ordered placed on file.]

THE PRESIDENT.—We will now go back to the report of the Committee on Legislation, which is the second most important thing.

REPORT OF COMMITTEE ON LEGISLATION.

[The report as printed in the "Massachusetts Law Quarterly" for August, 1928, was read by Mr. Philip Nichols, Chairman.]

THE PRESIDENT.—Gentlemen, you have heard this very careful and admirable report; what is your pleasure in regard to it?

MR. HOLLIS R. BAILEY.—You have discovered by the report of the committee that there is a controversy now which has lasted for some little time between the Judicial Council and the Commissioners on Uniform State Laws on the matter of declaratory judgments. Some three years before the Judicial Council came into existence the National Conference of Commissioners began considering this

subject, appointed a special committee to work upon it, investigated the practice and history of the thing in England and Scotland and drafted a uniform law, and after three years' consideration they have adopted it and approved it and recommended it to be adopted in the different states. That was some four or five years ago. Since that time eight or ten states have adopted that uniform law. The courts in Pennsylvania and New Jersey have considered the constitutionality of the act, as I am informed. Wherever it has been adopted it has worked well, and it is likely to work well if adopted in Massachusetts.

We agree with the Judicial Council that declaratory judgments are a good thing; we ought to have them in Massachusetts; we hope we may have them. But I may say I think that the three Commissioners in Massachusetts—Professor Williston, Mr. O'Connell and myself—have considered the matter very carefully and we do not think that any one of you, if you read the uniform law, would see any harm in it. You would think it was clear, concise, carefully worded and likely to do what is wanted. We still think it is the best way of accomplishing what is wanted. It would immediately, if adopted by the Legislature, give you what you want. If you have a rule of court, then you have got to have action by the different courts in the Commonwealth to put it into effect. That means delay; it might mean serious lack of uniformity unless that work were very carefully performed. So I still believe that the matter is a fair subject for consideration. We all want the thing; we want it in the best way. I am sorry we cannot agree with the Judicial Council on that point.

There is one other point that was discussed by the Judicial Council, and I think that is the need of having the verdict of a jury unanimous. There are a third of the states in the Union that I think in civil cases do not require the verdict of a jury to be unanimous—a verdict of nine to three, eight to four, by experience has been found to work exceedingly well. They changed the constitution in Ohio to do that and after they had tried it after the change I am told that disagreements disappeared; the thing worked. I hope in Massachusetts some time we may have it in civil cases. Whether we should have it in criminal cases is another matter, but I suppose it would require a constitutional amendment to have it in Massachusetts.

Mr. George P. Drury.—I understand there are two recommendations of the report of the committee that require affirmative

action by this meeting. I am not certain how Mr. Nichols intended the introduction in his report to be left—whether he felt that silence would give consent to the proceedings he has recommended or not. If he feels that he desires an affirmative vote I am prepared to make that motion. The other matter in which his report seems to require affirmative action is the matter of qualification for admission to the bar. I move you, sir, that the Committee on Legislation be authorized to prepare a bill to include the qualifications—in conjunction, of course, with the Board of Bar Examiners,—and that the proper officers of the Association be authorized to petition for such legislation, the extent of the legislation and the details to be, of course, within the discretion of the Executive Committee of the Association.

THE PRESIDENT.—You have heard the motion with regard to the proposed legislation on qualifications for admission to the bar. What is your pleasure?

MR. CARPENTER.—Has the Judicial Council done anything along these lines?

THE SECRETARY.—The recommendation was in the first report. The substance of the recommendation was that the limitation on the Supreme Court's action which was inserted in 1915 should be repealed.

MR. DRURY.—I did not have the recommendation of the Judicial Council in mind and desire to modify my motion—that the proper officers of the Association be authorized to petition for legislation along the lines of the recommendation of the Judicial Council.

THE PRESIDENT.—You have heard the motion of Mr. Drury as modified; are there any remarks?

MR. GUY NEWHALL.—We have a Committee on Legal Education which has been giving this matter some study during the last year. I think the Committee on Legal Education feels that any bill put in the Legislature today stiffening the requirements for bar admission would be like shooting at a star. It wouldn't get anywhere until it is backed up by copious statistics, investigation and figures from other states, and an awakening of public sentiment. That is what the Committee on Legal Education has been trying to accomplish during the past year. I think the introduction of any such bill now would be wasted energy.

MR. DRURY.—It may be that a petition is premature if it is not going to be supported by a great deal of agitation and publicity. I have not heard Mr. Newhall make any motion to substitute for

mine. If he has any constructive suggestion to make I shall be very glad to vote for it.

MR. NEWHALL.—I think our chairman has been unduly modest during our discussion. The chairman has done a lot of work during the past year, investigating what has been done by other states. We have not, as a committee, reached any conclusion. We have plans in view for a session with the Board of Bar Examiners which have not yet materialized. Last winter we were working on the proposition and we have not got started this fall. But I think the committee felt that it is much more than a question of requiring two years or one year of high school work or one year of college; that you might stiffen up the statute and it would not amount to "a hill of beans;" that probably under the present statute some constructive plan might be worked out by the bar examiners whereby the actual requirements for admission to the bar—not the paper requirements, but the actual requirements—might be stiffened up and a lot of deadwood eliminated. That is as far as we have got. As far as opposing this particular motion of Mr. Drury's, I do not want to do it. I merely thought that the members of the Association ought to know that the Committee on Legal Education was working to try to get some constructive plan, and, when we got that worked out, see if we could get others to back it up. I would like to hear from Mr. Bailey.

MR. BAILEY.—The last speaker suggested that we stiffen up the present requirements. At the last examination we had 838 applicants and we rejected over five hundred—two-thirds. That was pretty stiff. Last winter we had about five hundred applicants and we rejected two-thirds. A year ago it was about the same The year before that, about the same; four or five years, about the same. When you reject two-thirds of the applicants, even though they number five hundred or more, you are certainly imposing a good deal of hardship and suffering upon those who fail. We recognize that very fully and the bar examiners are not allowed to consider hardships—the time that those men and women have spent, the money they have spent. But do not minimize the work which is being done in saying that the requirements ought to be stiffened up in practice.

As to the general education, we agree we ought to require more general education. I worked on that pretty much single-handed for the last fifteen years. Two years ago I went to the Legislature and without any support from anybody, thinking that, perhaps, I would

get one word—my bill was to strike out the word "evening" so that we might have two years of real high school work required, which would increase the requirements about four times what they are now, because one regular year in a day high school is probably equal to two years in an evening high school. But nobody appeared to oppose and nothing happened.

THE PRESIDENT.—Well, gentlemen, the trouble, of course, with Brother Bailey's "evening" was that it descended into night as far as the Legislature was concerned and disappeared. Now I can tell you what has been done this year. I quite agree with what Brother Newhall says of the futility of going to the Legislature on merely a "hurrah" plan of trying to get a statute changed. Brother Bailey tried to do it in the most modest way that anybody could possibly conceive of. In other words, he wanted to see if the two years in the evening high school could not be omitted and get two years in a day high school. If any of you know anything about two years in the evening high school, you know it is the most astonishingly small amount of education that anybody could possibly conceive of. I have gone into the evening high schools to see what they do and teach, and it is really ridiculous. But I do not think we can get anywhere with any such attempt at change. The only thing we can do is to go into the thing more deeply than before, so as to get the ammunition, and that is what the committee has been trying to do this last year. And then, when we have got it, the only way to do is to go to the associations of laymen and see what they can do. I tried that on; I asked the Associated Industries if they would let me appear before them and tell them what our situation was, and they very kindly did so and I went up and harangued them for an hour at their monthly meeting. I was extremely encouraged and the members of their committee afterwards said that they had no realization that this was the condition in the Commonwealth. Of course, their businesses are conducted in an entirely different way. They would not take a man with an evening high school education; they said so. I believe it is possible to arouse the people of this Commonwealth to a realization of this condition, but you cannot do it until you get the ammunition ready.

Now through the kindness of Brother Bailey I have the entire record of the thousand persons who applied for admission in 1927. I have gone through the whole of it and catalogued them all. This showed some interesting results. I expect eventually to get that material into shape so that I can present it. It took considerable

time. Then I got up a questionnaire—I say I, because a good deal of the work came on me—to find out what they did elsewhere. It takes some time to get forty-eight states to reply to you on any questionnaire. But I know now what they have done throughout the country so far as putting into effect their requirements are concerned. And of course I know from Mr. Reed's last book on the statutory requirements issued by the Carnegie Foundation how all the states stand. I got an advance copy of that. I think in the course of the next year, if we can have time enough, we can get together a sufficient amount of ammunition to show what the real situation is. When that is done I don't believe we will get anywhere in the Legislature until we have aroused public opinion. I see no way of doing that except to go to representative bodies of laymen and tell them if they want to have a bar that has got any education at all they must take hold and work with us; that we are doing as well as we can and if they don't care about a well-trained bar, all right; but if they do, then they have got to do something, and I think they will do it. While I agree with the spirit which animates Brother Drury, I think it will be futile to go up there after what Bailey tried to do. I spoke in favor of his bill. It was a sad sight, because there were only two or three of us there and we were looked upon, as far as I could see, as persons who were introducing revolutionary measures. We had to go away and the little change which we suggested was turned down. If you think it is a good plan—and I think that is open to question—to go there every single year until you get what you ask for, you can go ahead on that plan. If you do it with the idea that the Association is going to keep on in favor of a better education until you get it, that is another proposition. I don't know which of those propositions is right—whether it tires the Legislature to see a body of lawyers toiling up there without any hope in their faces and with no support in the community, or whether it is better to let the Legislature rest while they are trying to see what they will do with the Elevated Railway and then the Compulsory Insurance, and then tackle them again when we have more ammunition and support. I think we are open to suggestions from this assembly here as to what is the best method.

MR. DRURY.—Brother Grinnell is on record. I don't know what he proposes to do. Perhaps we had better hear from him.

THE SECRETARY.—The Judicial Council made this recommendation in its first report and it has renewed the recommendation in the

second and third reports; and while the fourth report is not yet out, I have no reason to suppose that the Judicial Council has changed its opinion. That report is sent by the Governor—the regular method which is pursued has been to send it to the Legislature by special message, so that the matter will be pending before the Legislature in the ordinary sequence of events in a formal manner by inclusion in that report. There it is before the Legislature if anybody sees fit to support it. So I do not think in that particular case it is essential that there should be a vote from the Association at this time, unless the Association wishes to make one.

MR. DRURY.—Then if I may be permitted, I would like to withdraw my motion.

THE PRESIDENT.—I think this question is rather ripe in a way this next winter, because, owing to the charges which the Insurance Commissioner made that we were all or many of us prosecuting fraudulent claims, the question naturally comes up what type of person we have got at this bar and whether we can get a better type. It may be that the incoming governor can be prevailed upon to say something in his message.

MR. W. T. A. FITZGERALD.—I have had some experience in the legislature—three years in the House, three years in the Senate. I served on various committees—judiciary, rules, liquor law, street railways, public charitable institutions. I think I have a pretty good cross-section of how legislative committees feel about bills that have no chance of success. I think that committees, if they consist of those who in the past have listened to the presentation of this question, would regard it as what they call a "hardy annual," would be inclined in advance to listen as intently as possible and then immediately make a decision without leaving their seats, "Next annual session of the Legislature." That would be my understanding of the way they would probably feel about it. I am very much in favor of raising the standard of legal education required for admission to the Bar if it can be done in some reasonable way. I would like to see the qualification of applicants increased, particularly with regard to reading, and writing, and figuring the English language. It certainly comes down to reading, writing and arithmetic. My experience at the bar for thirty-one years, my experiences in public life a good many years, my experience as Register of Deeds twenty-two years in Suffolk County, have convinced me that one of the most important qualifications is training in reading, writing, and, as I say, figuring in the mathematics

of the English language. I see so many lawyers who do not understand the proper framing of a sentence—do not understand the meaning of a sentence. They do not know how to write the language; and those who do know how to write the language, do not have any idea of writing, so far as legible handwriting is concerned. A great deal of the time of the register of deeds is spent in telephoning to the State House to identify the signature of a notary public or justice of the peace, who may be a long-standing member of the bar.

I also had experience in evening high schools. I attended the English High School at the time when that was the ultimate source of education of a dozen captains of industry in this section of the country. After leaving the English High School I spent two years in the evening high school. My experience is entirely contrary to that of the chairman. A good many of the fellows who went to the high schools simply went because they were sent and in some way they got through—some of them did not get through. Those who went to the evening high school, on the contrary, forty years ago, went there because they wanted to acquire additional knowledge; they wanted to get additional education. And in the classes that I attended in phonography and English and logic, elementary psychology, accounting and bookkeeping and conversational French, there were very intense students. And one who would get the benefit of three years in the evening high school, as education was administered in those days, in my opinion was much better qualified from an all-around educational standpoint than many who get through three years in the day high schools. We had wonderful teachers in those days.

I think when there is a fair prospect of success at some future time, when everybody is united on a plan, the qualification required should be that of a graduate of a day high school, or an equivalent education in the evening high school of three or four years, as the case may be. That plan would be something reasonable to present.

I do not think you would have much success in trying now to rescind entirely the limitation that has been placed upon the powers of the Supreme Court against entering into the educational qualification of those who have had two years in the evening high school. I think the limitation should be raised, but I think now is not the proper time to do it.

DEAN GLEASON L. ARCHER (Suffolk Law School).—Mr. President, if I may be allowed to say just a word—

THE PRESIDENT.—Yes, sir.

DEAN ARCHER.—I would like to say that I have opportunity to observe men who come out of the evening high schools of the present day, and I think my observation coincides with what Brother Fitzgerald said about what occurred there forty years ago. I believe there is a great difference in the mental attitude of the man who is getting an education, whether he is merely there because his folks want him to go, or whether he is there of his own volition to get the training. I have no objection whatsoever to a requirement of a college providing we have evening colleges, so that men may go on through the evening high school to evening college. But, under present circumstances, there is no opportunity for the man who has to leave school and support his family—there is no opportunity for him to go to a day college. And the fight that I have been making against that proposition was to prevent some of the most worthy men, some of the most able men that we have in our community—and that means 97 per cent of the boys of this nation—prevent them from being absolutely closed out. But I say, if we can have evening colleges, let them go there; give them an opportunity. I believe that we ought to have in Massachusetts a complete high school requirement. Let the evening high school be improved. We are doing that in Boston. Perhaps you know that two or three years ago the Central Evening High School was put on a totally different basis. I am having men come to me, college graduates, who cannot write decent English, who do not know what a sentence is, who cannot spell. I have men who are graduates of day high school that if they didn't have a diploma I wouldn't believe they had been in high school at all. They cannot write English that would do credit to an eight-year-old. We are flunking men out of the Suffolk Law School in great numbers because they cannot do the work. Last year I had the painful duty of flunking out a man who had two college degrees. Now that is what has happened. I am willing to work with you men on any proposition that will better the profession of the law.

While I am on my feet I would like to make a suggestion to your committee. An assumption has been made which I think is entirely gratuitous, that the crooks in the profession come from these men who have to go to the evening schools. I would like to see your committee, when it makes investigation of men who are com-

plained of, investigate their preliminary education in connection with that and see if there is any relation between the two things. Now we know that two district attorneys who were removed from office were graduates of colleges. And my observation is—and I have spent a good deal of time studying this thing—that there is no relation between the two things. I believe the man who has to work his way through school, by that very fact develops moral stamina that safeguards against going wrong in the profession of law—I have plenty of cases like this—a man comes to me who had to leave school when he was fourteen to support his folks; he has been putting his brothers and sisters through college. I had a man come to me last year, a man thirty years old, and he said, "I have put my brothers and sisters through evening high school. I wonder if there is a chance for me to become a lawyer. That has been my lifelong ambition." I believe in giving that kind of man a chance and I find that in the great mass of the students in the school those men prove the best men that we have. Some of the leading lawyers in Massachusetts today are men who are graduates of the evening high school of Boston. I could name for you one that was acclaimed by the *Boston Post* as one of the greatest criminal lawyers in Massachusetts who was a graduate from the Central Evening High School.

THE PRESIDENT.—The only thing I hoped was that eventually there would have to be a diploma taken in the high school, whatever it was. I don't care whether the man studied in the day or evening, but it should be something more than that he should attend two years; that he should pass some kind of a hurdle. And there is another thing which is the hardest proposition; you touched upon it slightly. I don't know how that is going to be looked into. There is no doubt whatever in my mind that when you get beyond the fact that a man does not happen to have landed in jail, there is hardly any way in which you can tell how a man is going to turn out. Education in some instances is not a necessary criterion by which you can judge him. How are you going to judge character is really the great question before us, and the Committee on Character in Suffolk "threw up the sponge"—one committee—and another committee has now started in on it and it is an extremely difficult proposition.

MR. DRURY.—One thing we have done is to ask them a lot of questions, more or less difficult questions, and we occasionally catch a man who lies to us. We also look up criminal records. If a man

has a criminal record we get it. Those two classes we deal with very strictly—the men with a criminal record and the men who lie; and they are frequently the very same individuals. I think we all agree that educational standards do require some improvement—not in connection with character but as bearing on ability. I am convinced from what has been said that the barrage has not been put down and it is not time to send anybody over the top, so I will ask permission to withdraw my motion.

THE PRESIDENT.—My attention has been drawn to Brother Nichols' statement that the Committee on Legislation should function as soon as any recommendations of the Judicial Council are made public and if they agree with them should cause bills, carrying these recommendations, to be filed and take steps to arouse public interest and actively support the bills. Is that before us for consideration, or is there any motion that you care to make?

MR. NICHOLS.—I will make a motion to that effect, but I think there are so many of those things on which the committee was unanimous, more perhaps than can be handled in a single year, or as many, and I think that as to most of them there probably would not be very much dissent among the members of the Association, so I will make that motion, confining it to those propositions in which the Committee on Legislation this year was unanimous in favor of support.

THE PRESIDENT.—Gentlemen, you have heard the motion, which, as I understand it, is that the Committee on Legislation proceed to have bills filed carrying into effect the recommendations of the Judicial Council upon which there is no dissent, and that they take steps to arouse public interest in those bills and actively support those bills.

JUDGE KEYES.—I am quite interested to see what a good balance we have in the treasury and I wonder whether that committee needs any power to draw on that balance or whether it has it.

THE PRESIDENT.—I understand the way the treasury is managed, in my experience, is that when a committee needs to spend any money, somehow it gets it. Are there any further remarks?

[Mr. Nichols' motion was adopted.]

THE PRESIDENT.—Is there any further business to come before the meeting?

MR. R. DEB. LABROSSE (of Lawrence).—Mr. President, there is one question which you have touched upon in your address and which I would like more information upon. I do not think it was

covered in the statement by the Committee on Legislation. It has reference to compulsory insurance, which you have treated as compensation. What leads me to say anything on it is, perhaps the remark that has often been made, that members of the bar are best qualified to defend themselves and, perhaps, the ones who least defend themselves in case of encroaching legislation. I do not believe for one moment that all of us are subject to the accusation that fraudulent claims have been presented. There is, at the present time, a great deal of agitation being made in the public press with reference to making a state depository for the new compulsory insurance, perhaps changing it from an indemnification for legal wrong to a compensation for suffering, as has been the case with the Workmen's Compensation. I surely should like to know personally whether the committee has considered the question of its attitude with reference to the legislation which will doubtless be presented at the next session, making insurance which is compulsory a state affair, and what the committee has decided upon that point, if anything.

THE PRESIDENT.—Nothing has been done by the Executive Committee, because there is nothing before it. I suppose the Legislative Committee has not considered it because they have not had anything before them either.

MR. NICHOLS.—Yes, we confined ourselves to the thirty-nine suggestions of the Judicial Council and there was nothing about compulsory insurance in that. So this matter that is brought up now has not been considered by the Committee on Legislation at all.

THE PRESIDENT.—There will be plenty in the next report of the Judicial Council about it, but that has not yet been made public; nobody knows what it will be.

MR. LABROSSE.—Might I suggest, then, that some recommendation be taken up, so that from the very beginning the Bar Association could have some weight upon the public opinion from the very beginning and, perhaps, if it deems it advisable, counteract some of the statements which are being made at the present time. I had particular reference to the statement that it was the duty of the state in such cases to furnish insurance and eliminate expense.

THE PRESIDENT.—That is a pretty large subject. It seems to me if you wait for the report of the Judicial Council and see what the report is, then take it up with the Committee on Legislation and map out something, some position for the Association to take, it

might be necessary to have a special meeting of the members and discuss the whole thing. My own impression—merely an impression—is that we are going to be plunged into a comprehensive and broad discussion of the whole thing; that the compulsory insurance act is going to be fought, at least, amended and, perhaps, an effort made to repeal it; that we shall have many remedies for the traffic problem suggested—there is no citizen who has not got a remedy. The only difficulty is that no two agree on the same remedy. They are all going to be precipitated into the legislature, and where we should fit in and the part we should play when the forces get on the field is a matter that the Executive Committee will take up and, quite likely, there may have to be a special meeting of the Association to consider it. I do not think we should pass a vote at this stage in regard to something that you think somebody may possibly introduce. If you would be content to leave that to the Executive Committee I think they will be alive to the proposition.

Is there any further business to come before the meeting?

[There being no further business, the meeting adjourned.]

F. W. GRINNELL,
Secretary.

THE MICHIGAN STATUTE AS TO CHARGING JURIES.

A correspondent has called attention to Michigan Public Acts 1927, No. 175 (Code of Criminal Procedure) c. VIII, §29:

> **" . . . The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require. . . ."**

The Michigan Supreme Court has just decided the first case under the statute permitting a trial judge to comment upon the evidence and the witnesses in criminal cases. *People* v. *Lintz*, Mich. , 222 N. W. 201 (1928). The case is interesting and helpful because it reprints the charge in full and also reprints the statute. The judge laid out for the jury the story of the case as he saw it without plainly telling them that this was merely his opinion. It sounded in many respects like a peremptory instruction to find accordingly. It is true that at some points in his remarks the judge told the jurors that they might make their own findings. But these portions of the charge were not sufficiently prominent to save the conviction from a reversal.

NEW MASSACHUSETTS STATUTES.

1. As to Courts Which Become Operative On September 1, 1929.

The following acts, based on recommendations of the Judicial Council, have been adopted by the legislature to take effect September 1, 1929.

C. 126 giving the Supreme Judicial Court and the Superior Court jurisdiction in equity in matters relative to the observance of the purposes of gifts and conveyances made to counties, municipalities and other subdivisions of the Commonwealth. (See Fourth Report, Judicial Council, pages 63-66.)

C. 133 an act authorizing the stay of execution in capital cases by the Supreme Judicial Court or a justice thereof pending the final determination of judicial questions. (See Third Report, Judicial Council, page 32 and Fourth Report, page 46.)

C. 172 an act to expedite the Collection of Debts. Chapter two hundred and thirty-one of the General Laws is hereby amended by inserting after section fifty-nine A, inserted by section one of chapter five hundred and nine of the acts of nineteen hundred and twenty-two, under the title "Expediting the Collection of Debts" the following new section:—

Section 59B. In any action of contract where the plaintiff seeks to recover a debt of liquidated demand, he may, at any time after the defendant has appeared or, in a removed case, after its entry, on affidavit by himself or by any other person who can swear to the facts of his own knowledge, verifying the cause of action and stating that in his belief there is no defense thereto, move for the immediate entry of judgment for the amount of the debt or demand, together with interest if any is claimed. The motion may be set down for hearing upon four days' notice and after hearing the court may, unless the defendant by affidavit, by his own evidence or otherwise, shall disclose such facts as the court finds entitle him to defend, enter an order for judgment for the amount of the debt or demand, with interest if any is due and costs. Judgment as aforesaid shall be entered at the expiration of seven days from the order unless the defendant in the meanwhile files a demand for trial; and if such demand is filed as aforesaid the case shall be advanced for speedy trial. If the defendant does not appear at said hearing or file at or before the time set for hearing an affidavit setting forth specifically and clearly the substantive facts upon which he relies as a defense, the court may enter judgment by default.

(See First Report, Judicial Council, pages 32 and 141; Second Report, pages 43 and 113; Fourth Report, page 49.)

C. 173 an act providing for prompt informal trials in the Superior Court.

Section 1. Chapter two hundred and thirty-one of the General Laws is hereby amended by inserting after section sixty, under

the title "*Providing for Prompt Informal Trials in the Superior Court,*" the following new section:—*Section 60A.* In any action at law or suit in equity after issue joined in the superior court, any party to the proceeding may, by a writing filed in the clerk's office, offer to waive any or all of the following:

(1) A trial by jury if it has been claimed.

(2) The right to file interrogatories except as allowed by the court.

(3) The rules of evidence to the end that any evidence may be received which the court considers probative.

(4) The right to appeal from, or take exceptions to, any ruling, order, judgment or decree except on a question of substantive law.

A written notice of such offer with a copy thereof shall be served by registered mail, with return receipt requested, upon the other party or his attorney not less than ten days before the trial of the action or suit. If such offer is not rejected by a writing filed in the clerk's office within ten days after such notice or within such further time as the court may on motion allow, such offer shall be deemed to have been accepted and the matters in controversy shall be tried and determined in accordance therewith; and such action or suit shall be advanced for speedy trial.

C. 185 to allow defendants in the Superior Court in criminal cases other than capital cases, to elect to be tried by the court instead of by a jury. (See First Report, Judicial Council pages 21, 97, 108, 112; Third Report, page 107; Fourth Report, page 47.)

C. 186 extending the rulemaking power of the Supreme Judicial Court and the Superior Court to include the making of rules of procedure for securing the interpretation of written instruments without other relief. (See Third Report of Judicial Council, pages 65-66; Fourth Report, page 49; American Bar Association Journal for December, 1928, pp. 633-640.)

C. 258 an act relative to cases of desertion or non-support. Section one of chapter two hundred and seventy-three of the General Laws as amended by chapter one hundred and twenty-six of the acts of nineteen hundred and twenty-five is hereby further amended by adding at the end thereof the following new sentence:—In a prosecution hereunder for desertion or non-support against a husband, a decree or judgment of a probate court in a proceeding in which the husband appeared or was personally served with process, establishing the right of the wife to live apart, or of her freedom to convey and deal with her property, or the right to the custody of the children, shall be admissible and shall be *prima facie* evidence of such rights. (See Fourth Report of Judicial Council, p. 50.)

C. 265 relative to the preparation and transmission to the full court of the Supreme Judicial Court of necessary papers in appellate proceedings and relative to the entry of such proceedings in said court. (See Fourth Report, Judicial Council, pages 49 and 60.)

C. 316 removing the jurisdictional limits of the district courts for civil business and providing the defendant with a right of removal to the Superior Court for hearing with or without jury in cases involving an amount in excess of the jurisdictional limits of said courts prior to September, 1929. The act does not alter in any way the right of removal of cases within the present jurisdiction of the district courts. (See Second Report of the Judicature Commission; pages 40 and 141; First Report of the Judicial Council, pages 47 and 145; and Fourth Report, page 47.)

C. extending the Equity Jurisdiction of Probate Courts. (See Third Report of Judicial Council, pages 67-68, Fourth Report, page 51.)

2. Attachments.

Conveyancers and others concerned in the law of real estate will be interested in *C. 131,* relative to attachments of real estate, which was approved on March 18, 1929, and takes effect 90 days from that date. The act changes the law as laid down in the case of *Bates* v. *Nessen* (decided May 25, 1928, Adv. Sheets, 1928, page 1017) and provides that an attachment shall not be valid "in any case when the name of the owner thereof under which he acquired title thereto as appears on the public records is not included in the writ unless the writ is seasonably amended to include such name and then only from the time when a correspondingly amended copy is deposited as aforesaid."

3. Seals.

C. 377 an act relative to Seals and Sealed Instruments.

Whereas, The deferred operation of this act would defeat its purpose, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Section 1. Section seven of chapter four of the General Laws, as amended in clause twenty-ninth by section one of chapter one hundred and seven of the acts of the current year, is hereby further amended by striking out said clause twenty-ninth.

Section 2. Said chapter four is hereby further amended by inserting after section nine the following new section:—

Section 9A. In any written instrument, a recital that such instrument is sealed by or bears the seal of the person signing the same or is given under the hand and seal of the person signing the same, or that such instrument is intended to take effect as a sealed instrument, shall be sufficient to give such instrument the legal effect of a sealed instrument without the addition of any seal of wax, paper or other substance or any semblance of a seal by scroll, impression or otherwise; provided, that if in any case the seal of a court, public office, public officer or corporation is expressly required by the constitution or by statute to be affixed to a paper, the word "seal" shall mean either an impression of a wafer or wax affixed

thereto. The word "person" as used in this section shall include a corporation, association, trust or partnership.

SECTION 3. This act shall take effect contemporaneously with section two of said chapter one hundred and seven.

NOTE.—This act and §2 of chapter 107 will take effect 90 days from March 11, *i. e.*, June 9, 1929.

Note.

Various proposals for legislation in regard to seals and sealed instruments were collected and discussed in the *Quarterly* for February, 1928, pages 68-78. Similar proposals were considered this year and after thorough discussion, c. 377 was adopted by the legislature and takes effect on June 9, 1929. This act avoids the objections raised to the various other drafts and does two things, first, section 1 provides that a recital of an express intent that an instrument shall be a sealed instrument shall have the same legal effect that is given to an instrument by impressing or attaching a seal. The only effect of pasting a seal on a document is to express such intent. This act merely provides an alternative optional method of expressing that intent. The second section of the act merely provides that an unincorporated association or trust may adopt and use an impressed seal without using a wafer or wax. It is a purely permissive section and does not require any association or trust to adopt an impressive seal if they prefer to use the ordinary wafer or if they prefer to take advantage of section 1 and rely upon a recital without a wafer. While this act is sweeping in its provisions, it seems to us the only safe way of legislating upon so technical a matter. We believe the act will be found to be of great convenience without causing any confusion in the law. Presumably, corporations and some associations will continue to use seals as an additional evidence of authority to execute, but many members of the conveyancing bar in particular will probably feel relieved that the pasting of a wafer on an instrument with sticky material of varying strength and durability is no longer essential to the validity of a conveyance. F. W. G.

INTERROGATORIES.

In addition to the above statutes, chapter 303 restricts the number of interrogatories which a party may file as of right in a civil action to thirty. Leave must be obtained for additional interrogatories. This act takes effect on September 1.

EMINENT DOMAIN.

Chapter 380 provides an alternative method for land takings under which the damages for the whole taking will be finally determined before the public authorities are finally committed to the taking. This act has an emergency preamble so that it takes effect at once.

COMMENTS ON THE RECOMMENDATIONS OF THE SPECIAL COMMISSION ON TAXATION.

The second Report of the Special Commission "to Investigate the Entire Subject of State, County and Local Taxation and Revenue from Fees and Other Sources" was reprinted for the information of the bar in the Supplement to the QUARTERLY for February, 1929. The report is a short one covering about 20 pages so that it may easily be read. The drafts of bills, constitutional amendments and proposed questions for advisory opinions of the Justices of the Supreme Judicial Court are contained in the appendices and form the bulk of the report. The proposed questions suggested for advisory opinions of the justices will be found on pages 56–57 of the Supplement to the QUARTERLY for February. The proposed amendments to the constitution will be found on pages 58 and 106 of that supplement.

As a result of conversations on the subject, we have received the following comments in regard to various aspects of the recommendations in the report. As we have not thought of any satisfactory answer to these comments, they are printed in order to provoke discussion as they seem to deserve the serious consideration of every one interested in the subject.

F. W. G.

Notes on changes in the Massachusetts income tax law proposed by the Special Commission (House 1075, Appendix A).

1. "Section 16. Every fiduciary who is an inhabitant of the Commonwealth or who derived his appointment from a court of the commonwealth" . . . shall make a return, and if he fails so to do five dollars for every day his failure continues shall be added to the tax (Sec. 43).

Where there are two or more executors, trustees or guardians, a return by any one of them of the income of the estate, trust or ward would seem to be sufficient. The Federal income tax law provides as follows: "A return made by one of two or more joint fiduciaries . . . shall be sufficient compliance with the above requirement." Moreover, under the proposed bill (Sec. 17) any one partner may make return for his firm.

It is therefore suggested that the language quoted above from the Federal income tax law ought to be incorporated in the proposed bill. There is no occasion to require all the trustees of any one trust to sign the return. It is a return of the trust income

that is needed, for which purpose the signature of one trustee is enough. It is not desirable to leave it doubtful whether or not the penalty of five dollars a day must be collected by the commissioner whenever a return is not signed by all the trustees.

2. The bill imposes the same rate of taxation upon earned and unearned incomes. The commission argues that ability to pay may be as great in some cases of earned income as in some cases of unearned income, which is, no doubt, true if only the case of a large earned income be compared with the case of a small unearned income received by one who is too old to work. But extreme or unusual cases are not a sound basis for legislation, and it is generally agreed that earned income ought to be taxed at a lower rate than unearned income, for the sufficient reason that savings for old age and dependents must be taken from earned income in order to make the provision which the securities yielding unearned income already provide. Although the rate of taxation proposed by the Commission is rather low for unearned incomes, it is more than the present rate on earned incomes above $5,000 a year. It would be a policy of doubtful expediency for the Commonwealth to adopt the principle that no distinction is to be made between earned and unearned incomes.

3. The bill discards the principle, heretofore firmly established in Massachusetts, that double taxation is to be avoided. All income is to be taxed, even that derived from rents and mortgage interest. Evidently the tendency of this will be to increase rents and interest rates on mortgages. Any such increase will eventually be transferred to the price of goods and to the cost of all dwellings. Especially will this be the case with respect to mortgage interest. Mortgages now enjoy a favored position for savings bank investment, because they are free of the tax of one-half of one per cent on deposits. The proposed bill abolishes this advantage by abolishing the tax on savings banks and in addition places a tax on the interest which the owner of the mortgage will receive. The fund attracted into mortgages is diminished, and at the same time the interest is taxed. That must inevitably make the rate of mortgage interest higher than it would be without those disadvantages. One of the complaints made of the present system of taxation is that real estate is compelled to bear too heavy a burden. Taxing rents and mortgage interest is not calculated to lighten that burden.

4. Every unmarried person receiving a yearly income of $1,500 or more and every married person receiving $3,000 or more must make a return (Sec. 15). Coupling this with the taxation of all income, we find that a single person who earns $1,500 and has some small income from property must make return and pay tax on the income in excess of $1,500. We may assume, therefore, that a large number of people of small means will be required, if this bill becomes law, to make return. It is, no doubt, a sound principle that all citizens should contribute something to the support

of the government which protects them, but it is also a sound principle not to collect taxes which cost more than they produce, and not to put people to trouble and expense if the amount involved is inconsiderable. The effective way to make all citizens contribute to the cost of government is a poll tax levied on all persons, female as well as male, and not an income tax which will cost $5. for every $4. collected from some citizens and make trouble and expense for those citizens besides.

5. The Commission has, no doubt, considered whether the revenue to be produced by the proposed changes will be greater or less than that which the present income tax yields. Presumably estimates have been prepared. But it is to be observed that such estimates frequently prove to be wrong. When the present income tax was substituted, thirteen years ago, for the property tax on intangibles, it was expected to yield far more. Until very recent years that expectation was disappointed. If the estimates of yield from the proposed change should prove to be mistaken there would be no course open except to raise the rates. Now it is obvious that Massachusetts ought to have as low a rate as that of other States, and the proposed rates have evidently been recommended with that in view. Heretofore the Commonwealth has had a higher rate, but has given the income from its own enterprises and real estate an advantage calculated to attract investors. If the revenue from the proposed changes shall prove to be less than is expected, we shall have turned investors away from our land, our factories and our public utilities without achieving the purposes of competing with other States for capital. The risk is serious. Any higher rate than 3%, and no exemption of rents and dividends, will almost certainly increase the cost of securing new capital for Massachusetts enterprises and buildings.

Note.

Various constitutional questions raised by the report of the Commission were submitted by the Legislature to the Justices of the Supreme Judicial Court for an advisory opinion. The justices answered the questions by opinions filed March 27, 1929 (1929 adv. sheets). The Legislature, thereafter, voted to continue the Commission for another year for further study of the subject.

THE RIGHTS OF THE DONORS IN TRUSTS FOR CHARITABLE PURPOSES WITH SPECIAL REFERENCE TO THE LAW OF MASSACHUSETTS.

(This is the memorandum submitted to the Judicial Council of Massachusetts by Mr. Gray and referred to in the Fourth Report of that Council (p. 64) in connection with its discussion of procedure relating to gifts to municipalities for public uses and purposes. Since then the procedure as recommended by the Council has been adopted as chapter 126 of 1929. Mr. Gray's study of the law as to other charitable trusts will be valuable to any one concerned with the subject.—ED.)

The donors of property given upon charitable trusts, or their heirs, may have a reversionary interest in such property. The idea is also sometimes entertained that they have, or ought to have, a right to enforce the performance of the trusts. This notion seems to rest, to some extent, on the theory that they have a property right in the trust fund.

The donors' property right in the fund, if any, is strictly limited.

The property rights which the donors sometimes have in the fund by way of right of entry for breach of condition, possibility of reverter, or resulting trust, is something entirely separate from the personal interest which they may be thought to have, in a higher degree than the rest of the public, in the performance of the trust.

Cary Library v. *Bliss,* 151 Mass. 364, 377.

Even when a reversionary right exists, a breach of trust will give the donor no right to claim the property, except in the case of an express condition to that effect. The court will compel the performance of the trust, not the forfeiture of the property, and the donor has no pecuniary interest in the matter.

Sanderson v. *White,* 18 Pick. 328, 334;
Tainter v. *Clark,* 5 Allen, 66.

In the great majority of charitable trusts, moreover, there is no such reversionary right. If the exact intention of the donor

cannot be carried out, the fund is applied to similar charitable uses under the doctrine of *cy pres*. There is no reversionary interest in the donor or his heirs.

> See *Hadley* v. *Hopkins Academy*, 14 Pick. 240, 253; *Sanderson* v. *White*, 18 Pick. 328, 333; *American Academy* v. *Harvard College*, 12 Gray, 582, 595.

Where a failure of the particular objects designated takes place before the trust is established, the court will sometimes find that there was no general charitable intent and that the gift has lapsed. But after the trust has once been established the existence of a reversionary right will rarely be recognized in the absence of an express provision securing it. The court is reluctant to allow the failure of a charitable trust on account of difficulties in continuing to carry out the particular purposes designated. *Stratton* v. *Physio-Medical College*, 149 Mass. 503, 508; *Eustace* v. *Dickey*, 240 Mass. 55, 75; *Binney* v. *Attorney-General*, Adv. Sh. 1041 (1928). It practically always finds a general charitable intent and applies the fund *cy pres*. There seems to be no case in Massachusetts or England in which the court has given the property to the heirs on a failure of the charitable trust after it had once taken effect, except where there was an express condition or limitation, as in *Austin* v. *Cambridgeport Parish*, 21 Pick. 215; *Princeton* v. *Adams*, 10 Cush. 129; *Easterbrooks* v. *Tillinghast*, 5 Gray, 17. It is even said in England that there cannot be a failure of a charitable trust after it is once established.

> Tudor on Charities (4th ed.), 109, 110; and see *Re Slevin*, [1891] 2 Ch. 236.

The interest of the donor to have the trust executed, if and in so far as such interest exists, is not a property right but a personal interest.

> *Cary Library* v. *Bliss*, 151 Mass. 364, 377.

Is this personal interest recognized by the courts as the foundation of a legal right in any respect? Leave out of the picture, for the present, the part which this interest plays in the domain of constitutional law. The supposed right is evidently one on which no suit at law or claim for damages can be founded. Can it be the basis of a suit in equity under any circumstances?

The donors retain no control of the fund.

The donors lose control over the property by devoting it to a charitable use. Even the donors themselves, while they are alive, have no right to change the trusts, though the trustees consent.

St. Paul's Church v. *Attorney-General,* 164 Mass. 188, 196, 199, 202;
Eustace v. *Dickey,* 240 Mass. 55, 73;
Attorney-General v. *Kell,* 2 Beav. 575;
Attorney-General v. *Dulwich College,* 4 Beav. 255;
Re Hartshill Endowment, 30 Beav. 131;
4 Halsbury's Laws of England, p. 189;
Tudor on Charities, 123, 126;
11 Corpus Juris, 371.

A fortiori the donors' heirs cannot modify the trust.

Attorney-General v. *Margaret and Regina Professors,* 1 Vern. 55.

Cases on charitable trusts, where the donors are living, are rare, as most of such trusts are under wills, and where they are established by gifts *inter vivos* there are apt to be numerous donors, some of whom are dead and others cannot be found.

Unless the donors or their heirs claim that the charitable trust has failed entirely, so that they are entitled by way of resulting trust, they have no standing in court in suits concerning such a trust. In cases on questions of the application of the *cy pres* doctrine, or other questions as to the administration of the trust, they are not usually made parties. It is assumed that they have no legal interest in the matter. See, for instance:

Winthrop v. *Attorney-General,* 128 Mass. 258;
Boston v. *Doyle,* 184 Mass. 373;
Boston Safe Deposit & Trust Co. v. *Attorney-General,* 234 Mass. 261.

In *Eliot* v. *Trinity Church,* 232 Mass. 517, the donors were made parties, but the court gave no weight to their wishes on the question whether a *cy pres* application should be made.

When a *cy pres* application is necessary, the court considers what the donor's wishes would have been in such an event. But these wishes are gathered from the trust instrument.

Amory v. *Attorney-General,* 179 Mass. 89.

An expression of the donor's purposes, outside of the trust instrument, may possibly be used as a guide to the judgment of the court.

Hitch v. *Leworthy,* 2 Hare, 200;
Attorney-General v. *Madden,* 2 Connor & Lawson, 519 (Irish).

But it is clear that such wishes, not expressed in the instrument, cannot change the terms of the trust. And there is no intimation in any case that the wishes of heirs of the donors are to be regarded, even as a guide to the judgment of the court in framing a scheme.

The donors cannot initiate proceedings to enforce the trust.

The right to take action to enforce a charitable trust lies exclusively with the Attorney-General.

Burbank v. *Burbank,* 152 Mass. 254;
Trustees of Andover Seminary v. *Visitors,* 253 Mass. 256, 303.

The donors and their heirs have no right to bring proceedings themselves for the enforcement of the trust.

Sanderson v. *White,* 18 Pick. 328, 334, 339;
Dillaway v. *Burton,* 256 Mass. 568, 573, 574;
Strickland v. *Weldon,* 28 Ch. D. 426, 430;
MacKenzie v. *Trustees,* 67 N. J. Eq. 652, 685;
Petition of Burnham, 74 N. H. 492;
Kemper v. *Trustees,* 17 Ohio, 293;
Clark v. *Oliver,* 91 Va. 421.

There are *dicta* in several states (though not in Massachusetts) intimating that donors can sue to enforce charitable trusts. The actual cases of such suits are few, and can usually be distinguished on special grounds. The question of the right to bring the suit is often not contested. After there has been a hearing of the case, with all necessary parties represented, including the Attorney-General, the court is not bound to dismiss the bill because it was brought by the wrong party. *Women's Christian Association* v. *Kansas City,* 147 Mo. 103, 125.

In Kentucky, it seems to be law that the donor or his heirs may sue to enforce a charitable trust. *Tate* v. *Woodyard,* 145 Ky. 613. But this practice originated at a time when the right of the

Attorney-General to sue was doubtful. See *Chambers* v. *Baptist Educational Society,* 1 B. Monroe, 215.

The only reported case in Massachusetts where any persons other than the Attorney-General, or the persons holding the trust fund, or the expressly appointed visitors of the charity, have brought any proceedings for the administration of a charitable trust, is *Eliot* v. *Trinity Church,* 232 Mass. 517. The plaintiffs there did not sue as donors, for they joined the donors as defendants. The suit was not for the enforcement of the trust, but for its modification under the *cy pres* doctrine. Three petitions were brought concerning the same fund, which might be regarded as stages in a single case. The first petition was properly brought by the plaintiffs, who then held the fund. It seems that the second and third petitions, after the property had been transferred to the Church, should have been brought by the Church or the Attorney-General. But the petitioners were in a peculiar situation with respect to the fund, by reason of the fact that they had previously held it as trustees, had obtained the decree whose amendment was sought, and were parties to the agreement whose modification would also be necessary. A decree had been rendered on the second petition by a single judge, probably without the point being raised that the plaintiffs had no right to bring that petition. When the third petition reached the Full Court, they dismissed it on the merits, without mentioning the question as to the right of the plaintiffs to bring the petition. The latter point was raised by counsel for the Church in his brief before the Full Court, but apparently not before the single justice. Presumably the court thought it unnecessary to pass on such a point at that stage. The Church and the Attorney-General having been parties to all the proceedings, not only was the second decree clearly valid when entered, but the court could have given relief on the record in the last petition, even if it was irregularly commenced. See *Women's Christian Association* v. *Kansas City,* 147 Mo. 103, 125. As the bill presented no grounds for relief, there was all the less occasion to pass on the regularity of the procedure.

The donors are not visitors.

The idea that donors have a right to enforce the terms of the trust seems often to be founded on the theory that the donors are the visitors of the charity. See Zollman on Charities, §§603-606. The visitors of a charity may, under certain circumstances, bring

a bill to correct its administration. *Trustees of Andover Seminary* v. *Visitors,* 253 Mass. 256, 301. But in fact the donors or their heirs are in America seldom, if ever, visitors, so that their supposed right to sue can practically never be supported on that ground.

In *Sanderson* v. *White,* 18 Pick. 328, Chief Justice Shaw decided that the heirs of the donor could not sue to enforce a charitable trust. He held, first (p. 334), that they could have no standing unless as visitors, and, secondly, that they were not visitors, as the power of visitation was given to the trustees of the charity. He said that the heirs of the founder of an incorporated charity may in some cases be visitors of the charity. It is apparent from his opinion, however, that in the case of most charitable institutions in this country, whether corporate or not, there are no visitors, or the trustees are their own visitors, which comes to the same thing. To this effect, see also:

Drury v. *Natick,* 10 All. 169, 175;
Trustees of Andover Seminary v. *Visitors,* 253 Mass. 256, 269;
Dillaway v. *Burton,* 256 Mass. 568, 574;
Dartmouth College v. *Woodward,* 4 Wheat. 518, 675;
Allen v. *McKean,* 1 Sumner, 276; 1 Fed. Cas. No. 229, p. 498;
MacKenzie v. *Trustees,* 67 N. J. Eq. 652, 680-682.
Kemper v. *Trustees,* 17 Oh. 293, 329.

The law as to visitors arose in England with regard to certain ancient corporations different from any bodies existing in the United States. It does not apply to unincorporated charities, or to modern charitable corporations, where the trustees are their own visitors. See *Phillips* v. *Bury,* 2 Durnford & East (T. R.), 346, 352; *Green* v. *Rutherforth,* 1 Ves. Sr. 462, 472; Tudor on Charities, 63, 68. The whole system of visitation is obsolete and inapplicable to conditions in this country, except in the rare cases where visitors are expressly appointed. 2 Kent, Comm. p. 302; Zollman, §§607, 609. There is no instance in Massachusetts where any persons have been recognized as visitors of a charity for any purpose, except where they have been expressly appointed in the charter or deed of foundation. Even in England there seems to be no instance of a founder or his heirs suing to enforce a charitable trust, although such a case would undoubtedly be possible there, in certain instances, on the basis of their rights as visitors.

The donors are not necessary or proper parties to a suit to enforce charitable trusts.

That the donors or their representatives are not necessary parties defendant in suits about charitable trusts, except as they may have a reversionary interest on the failure of the charitable purpose, is shown by the cases in which they have not been made parties. See *Winthrop* v. *Attorney-General,* and other cases cited above. Numerous other instances could be found in cases which did not go to the full bench.

That they are not even proper parties seems to be intimated in *Dillaway* v. *Burton,* 256 Mass. 568, 576, where the court refused to allow a trustee under the will of the donor to intervene in a proceeding brought by the charitable corporation whose conduct was in question.

Undoubtedly precedents can be found for making such persons parties. See *Harvard College* v. *Society for Promotion of Theological Education,* 3 Gray, 280, where, however, the counsel for the donors took no part in the case. They have no doubt been joined in some cases, out of abundant caution, with an indefinite notion that they might have some interest, reversionary or other, which it was desirable to conclude. If nobody cared to object to their being parties, which would usually be the case, the propriety of their joinder would not be considered. See also *Eliot* v. *Trinity Church,* 232 Mass. 517.

The constitutional rights of donors.

The only Massachusetts case which recognizes any legal interest of the donors of a charity in the administration of the trust (except their theoretically possible rights as visitors in some rare case) is *Cary Library* v. *Bliss,* 151 Mass. 364. See also a reference to that case in *Codman* v. *Crocker,* 203 Mass. 146, 150.

In the *Cary Library Case* it is said that, for the purposes of the constitutional provision against the impairment of contracts, the donors of a gift for charitable purposes are parties to a contract, which cannot be altered by legislation, at least without their consent. Evidently this is a peculiar kind of contract, of very limited effect. It certainly cannot be sued on at law, or specifically enforced in equity. The rights arising from it are apparently not transmissible by will. The court says that the assent of the donor's residuary legatee "is not equivalent to the assent of the original donor. . . . Her residuary legatee does not legally represent

her desire to secure a permanent benefit to the inhabitants of Lexington." (P. 377.) The result of the case seems to be that the "contract" serves only the purpose of a "dead hand" which prevents the charitable trust being changed, except perhaps with the consent of the donors if they are alive.

The court said, however, that it was not necessary to decide that the residuary legatee of a donor could not consent for her. This reservation was perhaps made because it was felt to be unwise to decide that no possible action by the state could change the trust after the death of a donor. In view, however, of the strong statement that the donor's residuary legatee would have no right to consent, the solution of that difficulty would perhaps be found by deciding that the donor's interest could be sufficiently represented by the trustees. To obtain the latter's consent would seem to be a much more rational and practicable course than to procure the approval of probably multitudinous heirs or legatees. In *Codman* v. *Crocker,* 203 Mass. 146, 150, the court refers to the constitutional rights of the donors and "their legal representatives", which might mean their heirs, their legatees, or the trustees of the charity.

Even if the donor of a charitable fund has an interest in the charity which *ought* to be recognized as a basis for a right to sue for the enforcement of the trust (though it is not so recognized by the existing law), there is a strong implication from the language in *Cary Library* v. *Bliss* that such an interest should not be considered as passing to the donor's heirs, executors or residuary legatees. There is no propriety in giving such a right to sue to the residuary legatees of residuary legatees, perhaps traced through many estates and wills, especially as such ultimate inheritors of the donor's property rights would frequently be other charities, or corporations holding in trust for still more remote beneficiaries. Such persons or corporations have no special interest in seeing the donor's wishes carried out.

The donor's personal interest, whatever it is, if it is to be transmissible at all, would more properly pass to his heirs, or better still, to his descendants. ("Heirs" in Massachusetts includes a surviving wife.) At common law, a possibility of reverter, or a right of entry for condition broken, was not alienable or devisable, though the local decisions in this state are of doubtful import on this point. Gray, Rule against Perpetuities (3rd

ed.), §§12, 14; 1 Tiffany, Real Property (2nd ed.), §86. The same rule might be held to apply to these personal interests. Where the question is as to the right of visitation, reference is always made to the founder's "heirs", and the same is usually true in cases where the question is as to the right to bring an action for enforcement of the trust, but without making any express distinction between heirs and residuary devisees or legatees. It seems to be assumed, however, in the *Cary Library Case,* that all interest which the donor had, including this personal interest, if the latter passed to any one, would pass to her residuary legatee, rather than to her heirs at law, who are not mentioned as such.

Upon either theory, the difficulty of determining persons falling within the class after several generations would be enormous. And as one of the class would have as much right to be heard as another, it is a question whether one descendant or representative ought to be allowed to bring a bill without joining all the others as plaintiffs, or at least as defendants. See *Kemper* v. *Trustees,* 17 Oh. 293, 329. Visitors, acting as such, must take action as a body. It is not clear whether the same rule ought to be held applicable to heirs or legatees commencing proceedings for the purpose of bringing to the attention of the court a matter concerning a charity. At any rate, the class of persons who would be entitled to bring suit would in many cases be very large. If any other members wished to intervene, it would seem only fair to allow them to do so. There would therefore be great practical difficulties in allowing suits to be brought on this theory. See *Sanderson* v. *White,* 18 Pick. 328, 335; Zollman, §§605, 606.

In the case of charitable institutions which have received frequent legacies or contributions, or are supported by annual subscriptions, is every person who has contributed for the general purposes of the institution to be entitled to initiate proceedings to call the institution to account? Or is a distinction to be drawn in favor of original founders? See *Trustees of Andover Seminary* v. *Visitors,* 253 Mass. 256, 273; *Re St. Leonard Schools,* 10 A. C. 304.

Are all the persons who have contributed to the general funds of Harvard College, and their heirs, entitled to meddle in its affairs, or only the heirs, if they can be found, of John Harvard? Is anybody who has put a penny in the plate at church to have the right to interfere with the conduct of the religious society?

A principal reason for allowing the donor, or some person other than the Attorney-General, to initiate proceedings to enforce

a charitable trust, is the idea that the Attorney-General, who is an elected officer, and perhaps having various public duties to perform, open to political influences, may neglect his duty of bringing informations in a court of equity on questions of the administration and enforcement of charitable trusts. It may possibly be advisable to give authority to some other public officer to bring such matters before the courts. See the English "Charitable Trusts Act, 1853", establishing a Board of Charity Commissioners. The Commissioners may certify a case to the Attorney-General for action, but the Attorney-General need not proceed unless he sees fit. He can file an information on his own initiative, or on the relation of other parties, but where the matter can properly come before the Commissioners he does not usually take action except on their certificate. Tudor, 525, 526.

It should be remembered that under our present law, it is not generally necessary for the Attorney-General to take the initiative with regard to a charitable trust, except when the trustees neglect their duties. The trustees can apply to the court for instructions on doubtful questions and for authority to apply funds *cy pres*, or take any other steps that require an order of court. The Attorney-General is made a party, and can submit an argument. But whether or not any one argues the case, the court will see that the donor's purposes are carried out. This is a peculiarity of charity cases, that when once they are brought to the attention of the court, the court of its own accord will look after the interests of the public and of the donor. See, for instance, *Harvard College* v. *Society for Promotion of Theological Education*, 3 Gray, 280; *Winthrop* v. *Attorney-General*, 128 Mass. 258.

The instances where the trustees and the Attorney-General would both be so remiss as to fail to bring before the court questions as to which any real doubt exists, would probably be rare.

There are *dicta* in several states, and a few cases, to the effect that persons specially interested in the performance of a charitable trust as beneficiaries may file a bill, on behalf of themselves and other beneficiaries joining the Attorney-General. See *Lanning* v. *Commissioners*, 63 N. J. Eq. 1. In Massachusetts, however, it is clear that a beneficiary of a charitable trust cannot bring suit. See *Coe* v. *Washington Mills*, 149 Mass. 543, 547.

In order to avoid disturbances in the procedure, and possibly in the substance, of the law of charities, it would probably be desirable, if an heir of the donor or any public officer, other than

the Attorney-General, is to be authorized to initiate proceedings, that he should be required to do so by an application to the court, either for a writ of *mandamus* directing the Attorney-General to bring an information, or for leave to bring a proceeding in the Attorney-General's name, with the right to control the information. Under the present practice, the relator in an information by the Attorney-General is entirely at the mercy of that officer, who can not only refuse to bring the proceeding but can conduct it as he chooses or discontinue it.

Parker v. *May*, 5 Cush. 336;
Attorney-General v. *Parker*, 126 Mass. 216, 221;
Attorney-General v. *Onset Bay Association*, 221 Mass. 342, 350.

But the relator is liable for costs. *Attorney-General* v. *Butler*, 123 Mass. 304, 309. See also, on the position of relator, *McQuesten* v. *Attorney-General*, 187 Mass. 185; *Attorney-General* v. *Vivian*, 1 Russ. 226.

If an heir or a legatee is to be allowed to initiate any proceeding, the class to which such right is given should be described in unambiguous terms, and express provision should be made as to the joinder or intervention of other members of the class. If the initiative is given to a public official, it will not be necessary to join the donor's heirs, but any one of them can bring the matter to the official's attention, and others can be consulted informally. It might be desirable to give the official power to require the heirs, or other relators, to become responsible for costs.

The Attorney-General would in any case have the right to argue against the issuance of the writ or order, and the court ought to have a wide discretion with regard to it. When it was issued, the form of the subsequent proceedings would be as at present. It would therefore, not be necessary to amend in other respects the law or procedure with regard to charitable trusts, unless such other amendments were thought to be desirable even if the right of initiating proceedings should be left entirely with the Attorney-General.

ROLAND GRAY.

June 4, 1928.

NOTE.

The cases have not been examined exhaustively except in Massachusetts, but, so far as the writer is aware, in no state, except perhaps in Kentucky, is there any established practice of a donor bringing a bill for enforcement of a charitable trust, or any dis-

cussion which casts much light on the advisability of such a practice, or the limitations which should be imposed upon it.

As to the present duties of the Department of Public Welfare (which has taken over the duties of the former State Board of Charities), see G. L., c. 121, and c. 180, §§6, 12, and R. L. 84, §13, omitted in revision.

As to the practice on *mandamus*, see G. L., c. 249, §5, and *Bancroft* v. *Building Commissioner*, 257 Mass. 82, 84-86.

And as to the statutory right to petition for leave to file an information in the nature of *quo warranto*, see

G. L., c. 249, §§6-13;
Goddard v. *Smithett*, 3 Gray, 116;
Haupt v. *Rogers*, 170 Mass. 71.

"OVER SPEAKING JUDGES."

Lord Bacon, in his "Essay on Judicature" tells us that, "An over speaking judge is no well-tuned cymbal". This remark is one of general application, but we think it is particularly true of judges when sentencing convicted persons. And yet, the provocation, or the temptation, is, doubtless, strong at times, and able and distinguished judges sometimes fall into "over speaking". Mr. Justice FitzJames Stephen, one of the distinguished English judges, with pronounced views, in the early '80's, after pronouncing a severe sentence, which was doubtless deserved, proceeded to lecture the prisoner on the enormity of his offense. This was subsequently commented on in the "American Law Review" in a note on, "Moral Lectures from the Bench," in which it was suggested that a sentenced prisoner, or one about to be sentenced, was not likely to be in a frame of mind to be edified by a moral lecture and that the public is apt to be critical of a judge who feels it necessary to explain his sentence with extended remarks about life in general, with some of which they may disagree.

We do not mean to suggest too strict a practice as to judicial comments. Mr. Justice Mellor, in pronouncing sentence for perjury on the claimant in the Tichborne case, added briefly, "and it is much less than you deserve," or words to that effect. That was doubtless true and was sufficiently brief so that it would not cause public misunderstanding. Occasionally a judge may think it necessary to impose a severe sentence as an example and he may explain this briefly and simply. But before a judge makes more extended comments explaining the judicial mind, or rather his judicial mind, to the prisoner and the public, we suggest that he should write out beforehand what he thinks of saying and submit it to some of the wisest of his colleagues for expurgation if he can get the opportunity. The sentence, *if wisely imposed*, should, and will generally, speak for itself sufficiently and be accepted with confidence by the public from habitual respect for the opinions of the courts. But extemporaneous remarks from the bench are sometimes unfortunate. In recent years, we have had in Massachusetts a number of instances of "over speaking". If a judge is indignant about something, it is generally a good time for him to follow the late Judge Sheldon's practice of writing, "Patience—patience—patience," on a block of paper. If a judge thinks he is molding public opinion by his remarks, he should remember that, perhaps, he is not; and some of his statements may cause comments and reactions which he does not expect and may never see or hear.

The traditional practice of administering justice in a simple, dignified manner so that it will command respect without additional judicial comment or explanation is a sound tradition. F. W. G.

ADOPTIVE ADMISSIONS IN MASSACHUSETTS.

A stranger visiting the Massachusetts trial courts might be pardoned for supposing one of our most important rules of evidence to be that anything said by anybody in the presence of a party to a case is admissible against that party. Indeed, some instances would seem to indicate an even broader rule. Toward the close of 1928, two young men were arrested for larceny. Pending the preliminary hearing, one of the suspects remained in durance vile while the other was released on bail. The latter asserted his innocence, and made certain efforts to assist in the recovery of the stolen property. During these efforts policemen, detectives, and other persons uttered in his presence various declarations relating to the theft. At the preliminary hearing all such declarations were unhesitatingly admitted as against *both* defendants despite the absence of any showing that one culprit had ever heard of them before. Sometimes the matter is handled more carefully. Early in 1929, a woman was prosecuted in the Superior Court for keeping a house of prostitution. A police witness testified that after entering the house he carried on a conversation in the defendant's presence with a girl whom he found inside. As the witness was about to relate this conversation, the defendant's lawyer arose and suggested to the court that the defendant was quite deaf, and therefore the conversation was inadmissible. The court promptly asked the witness whether the conversation had been carried on in loud tones, and received an affirmative answer. He then asked whether at the same time remarks addressed to the defendant in the same tone of voice had elicited intelligent responses from her. Again the answer was affirmative. Thereupon the judge permitted the officer to testify to his conversation with the girl. This case suggests both the reasons for, and the limitations of, the doctrine under discussion. But a survey of the Massachusetts decisions will supply a good many more useful suggestions and details.[1]

Chief Justice Shaw rendered a typical expository opinion in *Commonwealth* v. *Kenney*[2]:

> "If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply,

[1] It should not be supposed that what are here dubbed adoptive admissions have an exclusive habitat in Massachusetts. They appear in every American jurisdiction. This collection of Massachusetts cases, while reasonably complete, is probably not exhaustive.

[2] 12 Met. 235 (1847).

wholly or partially admitting their truth, then the declaration and the reply are both admissible; the *reply*, because it is the act of the party, who will not be presumed to admit anything affecting his own interest, or his own rights, unless compelled to it by the force of truth; and the *declaration*, because it may give meaning and effect to the reply. In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts; first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them; but in the present case he has reported the facts, on which the competency of the evidence depended, and submitted it, as a question of law, to this court."[3]

The foregoing explanation is nothing but good, sound horse sense. Consequently it has a wide field of effectiveness. Silent or inferential acceptance of some assertion or situation, for instance, may do more than indicate that a legal obligation has been incurred at a past time. It may under appropriate circumstances create or help to create such an obligation. So where a workman, originally employed on indefinite terms, without comment received his pay for some 14 months in envelopes bearing a printed rule of the employer requiring two weeks' notice of intention to leave the employment, it was held that the jury had been properly allowed to find the

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[3] Other good general statements can be found in *Commonwealth* v. *Harvey*, 1 Gray, 487 (1854); *Commonwealth* v. *Brailey*, 134 Mass. 527, 530 (1883); *Commonwealth* v. *Funai*, 146 Mass. 570, 16 N. E. 458 (1888); and *Proctor* v. *Old Colony Railroad Co.*, 154 Mass. 251, 28 N. E. 13 (1891). See *Pray* v. *Stebbins*, 141 Mass. 219, 220, 224, 4 N. E. 824 (1886), stated at p. *infra*, for a sidelight on Chief Justice Shaw's assumption that one may not properly contradict an assertion in a judicial hearing.

assent of the workman to this rule and its consequent inclusion as a term of the contract.[4] The same principle can work in favor of as well as against the silent party. Take, for instance, the case of *Graham* v. *Houghton*.[5] Here the owner of some corporate stock on March 25, 1889, delivered the certificate to a dealer who promised in writing to dispose of the stock for the owner. In May or June, 1889, the dealer said to the owner that he had decided to take the stock himself, and would have the money in a few days. The owner made no objection to this method of disposition. The foregoing evidence was held admissible for the owner in an action against the dealer to recover the price of the stock. And, of course, it is a matter of common knowledge that under many circumstances silence may give rise to an estoppel. Swinging away from cases of substantive law to the purely procedural problem of impeaching witnesses, we find the principle still functioning. In *Hill* v. *Crompton*,[6] after a witness had given evidence favoring the plaintiff, one of the defendants was allowed to testify that in an interview between himself, the former witness, and a third person, the third person made to the defendant a suggestion antagonistic to the witness' testimony and the witness made no reply. This was proper impeachment of the witness, like proof of a prior inconsistent statement.[7] The purpose of this paper, however, is only to cover with reasonable completeness the Massachusetts decisions falling between these two extremes—that is, cases where real or fancied adoptive admissions have been proffered as evidence of facts material on the merits.

For purposes of clarity, the best approach to our topic is by way of the suggestion as to trial technique made in the last sentence quoted from *Commonwealth* v. *Kenney*. It will be observed that Chief Justice Shaw laid down definite preliminary requirements for admissibility of the kind of evidence which we are discussing. It will also be observed that satisfaction of these requirements necessitates certain determinations of fact. By whom are these determinations to be made, the judge or the jury? Perhaps, says the learned Chief Justice, the trial judge should handle these points once for all; clearly he must decide them in the first instance. Certainly it is orthodox Massachusetts doctrine that a judge sitting

[4] *Preston* v. *American Linen Co.*, 119 Mass. 400, 403, 404 (1876).

[5] 153 Mass. 384, 386, 26 N. E. 876 (1891).

[6] 119 Mass. 376, 381 (1876).

[7] Compare *Commonwealth* v. *Densmore*, 12 All. 535, 538 (1866), where the witness did not contradict a declaration made by her dying husband; evidence of incident excluded when offered to impeach witness; exceptions overruled.

with a jury shall "decide any preliminary questions of fact, however intricate, the solution of which may be necessary to enable him to determine the . . . admissibility" of evidence. To this doctrine there are exceptions, mainly where objections are based upon alleged irrelevancy[8] or where a "rule of mercy", maintained for the benefit of criminal defendants, comes into play.[9] But when counsel seek to divert hearsay evidence from the main channel of exclusion into the side channels of admission under exceptions to the hearsay rule, it is unquestionably our usual practice to have trial judges make the essential preliminary findings.[10] This seems at first blush to cover the problem under consideration, for if we use against A an extra-judicial assertion by B purely on the strength of B's utterance, we shall be admitting hearsay.[11]

But in actual practice judicial technique developed quite differently from the forecast of Chief Justice Shaw's original comment. It soon became settled, and has remained settled to the present time, that when B's statements are offered against A on the strength of the latter's adoption, the jury are to say whether the necessary conditions were satisfied.[12] Nor is any anomaly necessarily involved. True enough, we are fitting hearsay to an exception, for the best reasoned modern opinion so explains the reception of admissions.[13] Yet we are not admitting *B's* hearsay, but rather *A's* reflection thereof. This is fundamental and usually, though not invariably, recognized.[14] Observe, also, the exact points for

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[8] The quotation is from *Gorton* v. *Hadsell*, 9 Cush. 508, 511 (1852). *Coghlan* v. *White*, 236 Mass. 165, 128 N. E. 33 (1920), gives many illustrations of the doctrine, but is itself a relevancy case to which the doctrine did not apply.

[9] See the citations and comment in *Commonwealth* v. *Tucker*, 189 Mass. 457, 473–474, 76 N. E. 194 (1905).

[10] The most notable single illustration of this statement is found in the so-called Massachusetts hearsay statute, which has so greatly liberalized our law of evidence, G. L. c. 233, § 65.

[11] This exact point is made in *Commonwealth* v. *Roberts*, 108 Mass. 296, 300–301 (1871).

[12] See, for example, the following cases, which fall at both ends of, and during, a sixty-one year period. *Commonwealth* v. *Galavan*, 9 All. 271 (1864); *Mallen* v. *Boynton*, 132 Mass. 443, 445, 446 (1882), stated at p. ..... *infra;* and *Commonwealth* v. *Klosowski*, 252 Mass. 149, 151, 147 N. E. 577 (1925).

[13] Consult the brief and penetrating analysis by E. M. Morgan in 30 Yale L. J. 355 (1921), to which Wigmore pays tribute in his work on evidence. 2 Wigmore on Evidence (2d ed., 1923), § 1048.

[14] In *Commonwealth* v. *Saltzman*, 258 Mass. 109, 110, 154 N. E. 562 (1927), the court seems to lose its bearings for a minute. This was a prosecution for a liquor offense; the trial judge admitted police testimony that defendant's husband in her presence stated she was selling liquor and "there is liquor in the store now," to which defendant made no reply; in overruling exceptions, the Supreme Judicial Court says: "Either a husband or wife may testify against the other in a criminal proceeding, if the one testifying is willing to do so." The result of the case is easily defensible, but this reasoning is entirely out of place. No such misapprehension appears in an earlier husband-and-wife case. *Commonwealth* v. *Funai, supra* n. 3 and *infra* p. ..... See also *Commonwealth* v. *Galavan*, n. 12 *supra;* and *Boston & Worcester Railroad Corporation* v. *Dana*, 1 Gray, 83, 104 (1854), where evidence was admitted that a person since dead had made in defendant's presence certain statements indicating defendant's civil liability, and that defendant had not flatly denied the statements; defendant's evidence to prove subsequent contradictory statements by the decedent was excluded; held correct, since no question of decedent's veracity was raised.

determination. Normally there will be three issues: First, did the encounter between A and B actually occur as stated—in other words, is the testimony about it credible; second, was B's assertion heard by A, or otherwise brought home to him; and third, was A's action or attitude under all the circumstances such as to indicate his acceptance of the assertion? Of these three issues the first is undoubtedly for the jury.[15] As to the second and third, suppose A's opponent stood ready to testify that he heard A himself utter the admission in question. Plainly the judge should admit the testimony and let the jurors decide its truth. This seems an appealing analogy on which to model procedure where the claim is that A has understood B's words and somehow espoused or echoed them.

Mere avoidance of anomaly, however, is not synonymous with avoidance of all practical objection to a judicial process. The jurors' handling of the last two issues may sometimes have undesirable consequences. A pair of situations will indicate the possibilities. In the first, a workman's arm was broken by an industrial accident. The surgeon called to the scene expressed some hesitation about taking the case. Thereupon the injured man's son, standing near his father, said: "If you can't dress it well, I don't know where to go for a physician." The injured man remained silent. Assuming to treat the case, the surgeon did not accomplish a satisfactory cure, and the patient sued him for malpractice. At the trial, the defendant gave evidence of the foregoing incident to support his contention that the patient had assumed all risk of results if the surgeon did his best.[16] Suppose the jury found that no adoptive admission had been made, the injured man having failed to hear the conversation or having been in too great pain to answer. Plaintiff would not suffer any setback, because the son's remark, standing alone, leads to no unfavorable conclusion. But the second instance is very different: The victim of a theft approaches the apprehended suspect, points to him, and says excitedly: "That man has stolen my money." The suspect makes no reply.[17] If this evidence goes in at the trial, it may hurt the defendant substantially, even though the jury fail to find an adoptive admission. For here a very pointed assertion has been made, apparently on declarant's own knowledge, and the jurors

[15] The party charged with an adoptive admission often denies that the statement on which it is based was ever made; sometimes the person alleged to have uttered the statement joins in the denial; but this creates only a commonplace issue of relative credibility. See *Smith* v. *Duncan*, 181 Mass. 435, 63 N. E. 938 (1902).

[16] These are the facts of *Mallen* v. *Boynton*, n. 12 *supra*.

[17] This is *Commonwealth* v. *Kenney*, n. 2 *supra*.

may be intellectually unable to purge their minds of it. In extreme cases of this latter type, trial judges might well be allowed to take over the solution of the second and third issues described above, thus avoiding risks of ineradicable prejudice.[18]

The proper form of instruction to the jury has been indicated above and is elucidated by several cases.[19] Other decisions indicate errors that trial judges should, and apparently usually do, avoid. For instance, instructions which ignore the question of the party's knowledge of the assertion are defective and may give a proper basis for exception.[20] Correspondingly, instructions which cover only the point of knowledge and omit any reference to the nature of the occasion are equally defective.[21] Also the trial judge should not exaggerate the force of a situation which may be interpreted as leading to an adoptive admission. In *President, etc., of Greenfield Bank* v. *Crafts*[22] action was brought against the alleged indorser of four pieces of commercial paper. Defendant claimed that his asserted signatures were forgeries. A witness for the plaintiffs testified that he mailed to the defendant notarial notices of protest and also a letter requesting immediate attention to the matter, to which he received no reply. Subsequently, according to this same witness, he talked with the defendant, who admitted receiving the letter and assured the witness that one of the four

[18] The suggestion in the text calls for revision of the explanation given at the end of the preceding paragraph. Such revision is justified. For in cases of our type two problems are presented: (1) to find the facts constituting a situation, (2) to determine the legal significance of the aggregate of facts thus found. In the ordinary tort case, where due care is at issue, the jury often get both problems. But in an action for malicious prosecution, with probable cause at issue, the orthodox rule leaves only problem (1) to the jury, giving (2) to the judge. Combining the considerations of the text with the doctrine of *Gorton* v. *Hadsell*, n. 8 *supra*, about preliminary questions of fact, we might reasonably, in at least some of the adoptive admissions cases, give the judge entire control of (2) and partial control of (1). On this point consider the Massachusetts rule stated at p. .... *infra* about the effect of silence by an arrested man.

[19] *Commonwealth* v. *Galavan*, n. 12 *supra* and p. .... *infra*, seems to approve a charge leaving the jury to find "whether the defendant heard the statements . . . under circumstances which indicated that he understood and appreciated their relation to himself, and which reasonably called upon him to reply to or deny them." *Commonwealth* v. *Brailey*, n. 3 *supra*, indicates satisfaction with an instruction "that, if the defendant did not hear the question, he was not bound to answer; if he did, the jury would consider whether or not, under the circumstances, he was bound to answer, and how far any inference was to be drawn against him for not answering." But the word "bound" seems unfortunate, and in this very opinion the court ends by putting the question as whether "according to human experience, he would naturally reply. . . ." In *Commonwealth* v. *Funai*, n. 3 *supra* and p. .... *infra*, the charge was that "her declarations in his [defendant's] presence are only competent as bearing upon the question of his approval or non-approval of the language used by her," and the opinion again talks of what defendant would "naturally" have said if the assertion were untrue.

[20] But, of course, the aggrieved party must properly object and except. *Leavitt* v. *Maynes*, 228 Mass. 350, 352, 117 N. E. 343 (1917), as to which see n. 24 *infra* and the accompanying text; also case cited n. 26 *infra*.

[21] *Commonwealth* v. *Harvey*, n. 3 *supra*; defendant must not only hear the remark, but the situation must be one in which "it would have been fit, suitable or proper for him, or he would have been likely, according to common experience" to have broken silence. *Hildreth* v. *Martin*, 3 All. 371, 373 (1862), to the same effect, but exceptions overruled because no proper objection taken or request made.

[22] All. 269, 273 (1861). The trial judge made a similar mistake in *Commonwealth* v. *Goldberg*, 212 Mass. 88, 91, 98 N. E. 692 (1912), which is further described on p. .... *infra*.

instruments would be paid. The judge instructed the jury that if the defendant was fully informed of the alleged signatures when he received the notices or the letter, or talked with the witness, "it was his duty, at once or within a reasonable time, to express his dissatisfaction . . . or repudiation . . .". Defendant's exceptions were sustained, the court holding that no such duty existed. With respect to the protest, defendant might legally be silent and stand upon his rights. The instruction should have been only that defendant's "silence and omission to declare the indorsements to be forgeries were to be [might be?] taken into consideration as a circumstance tending to show that the signatures were put on the paper by the defendant, or by his authority."

The foregoing procedural discussion provides an outline upon which to continue. The first issue stated—whether the encounter between persons corresponding to our hypothetical A and B actually occurred—may be dismissed briefly. It involves nothing but standard determinations of veracity and the like. The second issue—whether A understood B's assertion—may best be presented by statement of a case or two. In *Leavitt* v. *Maynes*[23] a nurse and a physician sued a husband to recover for services rendered to his wife. It became material to rebut defendant's claim that he was living apart from his wife for justifiable cause. Plaintiffs called the wife, and she testified that the postman delivered two letters addressed to her husband; that the witness opened these letters (she always opened her husband's letters!), found them to be "of an incriminating nature", and showed them to the defendant. What ensued evidently nettled the lady: "He just laughed . . . didn't give me any satisfaction. . . . I handed him the letters. . . . *He wouldn't read them.* He asked what in h—— I was going to do about them and threw them on the table," whence the outraged wife retrieved them. No tacit admission, said the Supreme Judicial Court. Seemingly the husband knew what to do and enjoyed doing it.[24] To wives who wish the full advantage of prying into their spouses' mail, the suggestion of *Posell* v. *Herscovitz*[25] is recommended. Here a clothing designer sued for breach of a contract of employment. On the issue of incompetency, one defendant testified that *he showed and read to plaintiff five letters from customers complaining about the fit of garments designed by plaintiff,*

[23] Cited n. 20 *supra.*

[24] But counsel were not so adroit as their client. The evidence was admissible for another limited purpose, and there was no request that it be restricted to this purpose. Hence exceptions by defendant were overruled.

[25] 237 Mass. 513, 515, 130 N. E. 69 (1921).

and that plaintiff did not deny the writers' statements. Letters offered and excluded. On exceptions, the appellate court remarked: "There is strong ground for argument that the letters may have been competent by reason of the conversation concerning them with the plaintiff and his examination of them."[26] The irate Mrs. Maynes ought to have backed her husband into a corner and made him listen to those "incriminating" missives.

Our final issue relates to the manner in which A receives B's assertion. He may expressly admit its truth. Then, of course, no difficult evidentiary question arises. But A may also remain silent and inert, or say or do something susceptible of various interpretations, or unequivocally deny what B says. Most of the cases have to do with the effect of A's silence. Let us first consider those holding or stating that a tacit admission might properly be found. *Commonwealth* v. *Galavan*[27] is an excellent sample. Galavan was prosecuted for mingling poison in B's drinking water with intent to kill B. After the alleged occurrence of the criminal act, defendant had paused outside the open door of a room in which were B and one or more other persons, while B made material statements about matters which, if true, were within defendant's knowledge. No officer of the law was present. Galavan remained as if listening until B finished speaking, then went away. Held that evidence of the incident and what B said was properly admitted.

Somewhat more enlivening is *Commonwealth* v. *Funai*,[28] a liquor prosecution. Police witnesses testified that while a search was going on, Mrs. Funai proclaimed in her husband's presence: "We will sell liquor in spite of all the officers of Station 1." Funai apparently kept quiet. The jury backed up Station 1, and the Supreme Judicial Court overruled exceptions.[29] In *Pray* v. *Steb-*

[26] Again counsel slipped up, this time by failing to get the letters into the record. Exceptions overruled. *Cf.* on the merits *Cheney* v. *Cheney*, 162 Mass. 591, 592, 39 N. E. 187 (1895), where books containing pertinent entries were excluded when offered by defendant with evidence that plaintiff had access to them and had been seen looking at them. Exceptions overruled; it was a mere guess whether plaintiff ever saw the particular entries.

[27] Cited n. 12 *supra*.

[28] Cited n. 3 *supra*.

[29] For convenient reference other liquor cases are here listed. *Commonwealth* v. *Brothers*, 158 Mass. 200, 33 N. E. 386 (1893); Police officers testified that they found in rear and cellar of defendant's drug store indications of sale of liquor, called defendant's attention to some of these indications, and received no reply from him; instruction that if defendant was fairly called on to reply, failure on his part to do so might be considered; guilty; exceptions overruled. *Commonwealth* v. *McCabe*, 163 Mass. 98, 39 N. E. 777 (1895); Case resembling *Commonwealth* v. *Brothers;* police seized beer which was being drunk by men in defendant's kitchen; the men objected, saying in defendant's hearing that they had paid for the beer and it was theirs; guilty; exceptions overruled. *Commonwealth* v. *Klosowski*, n. 12 *supra:* Liquor was seized in a store in defendant's building; a police witness testified that he, X, and defendant were in an adjoining store, defendant being 20–25 feet away from witness and X; witness asked X if he ran the store [where liquor was seized?]; X said no, he was employed by defendant; defendant said nothing; evidence of this colloquy admitted; guilty; exceptions overruled. *Commonwealth* v. *Saltzman*, n. 14 *supra*.

bins[30] the defendant fell upon a neat dilemma. On a second trial, Pray offered evidence of a material statement which a witness, since deceased, had made to the judge at the former trial, Stebbins and his lawyer being present and not taking issue with the statement. Held properly admitted; reported testimony if the witness was testifying from the stand, adequate basis for a tacit admission if he was merely tendering information from the floor of the court. *Gould* v. *Kramer*[30a] is a telephone case where another wife talked not wisely but too well. Gould claimed that he had lost his job because of Kramer's illegal interference. He testified to a telephone conversation in which Kramer accused and threatened him; then Mrs. Kramer seized the transmitter at her husband's end of the line, and added an epithet and threats of her own; then Kramer resumed without disavowing his wife's contribution. Evidence of the lady's remarks was held to have been properly admitted. Sundry additional cases are grouped below.[31]

Now come decisions to the effect that silent reception of certain assertions did not provide any basis for inferring tacit admissions. *Johnson* v. *Trinity Church Society*[32] has about it an odor of sanctity and more than a touch of humor. The Rev. Mr. Johnson, suing for his salary and seeking to prove the term of employment, gave evidence that in a sermon he spoke to his congregation of meeting them "at the beginning of a year to us of united Christian labor" and that his auditors remained silent. But the court would have none of it. If sermon-time is not an occasion for sleep, neither is

[30] Cited n. 3 *supra*.

[30a] 253 Mass. 433, 438–439, 149 N. E. 142 (1925).

[31] *Mallen* v. *Boynton*, nn. 12 and 16 *supra*. *Commonwealth* v. *Brailey*, n. 3 *supra*: Prosecution for statutory arson; witness for prosecution allowed to testify that at or soon after the fire he said to defendant: "What did you want to set this afire for?" and defendant did not reply; guilty; exceptions overruled. *Proctor* v. *Old Colony R. R. Co.*, n. 3 *supra*: Tort for flooding plaintiff's land; plaintiff prevented from testifying that in interviews with representatives of defendant these representatives did not deny defendant's liability; verdict for defendant; exceptions sustained. *Commonwealth* v. *O'Brien*, 179 Mass. 533, 61 N. E. 213 (1901): Prosecution for being a lewd, etc., person; police evidence admitted that listeners, outside a room where defendant was found, heard an exclamation by another occupant of the room tending to establish the charge against defendant; guilty; exceptions sustained, but opinion states that foregoing evidence might have been properly admitted. *Sumner* v. *Gardiner*, 184 Mass. 433, 436, 68 N. E. 850 (1903): Action against X, Y, and Z as partners under the name of M Company; witness for plaintiffs allowed to testify that after action had been brought one of plaintiffs in the presence of witness and X asserted that X was in the M Company; X made no reply; exceptions overruled. *Commonwealth* v. *Dewhirst*, 190 Mass. 293, 296, 76 N. E. 1052 (1906): Prosecution of clerk of an association for making false entries; evidence admitted that at a directors' meeting president of association said in defendant's hearing that defendant made wrong entries to cover a deficiency and defendant remained silent; guilty; exceptions overruled. *Keeger* v. *Margolies*, 227 Mass. 223, 116 N. E. 398 (1917): On question of what goods defendant ordered from plaintiffs' slips containing items ordered which were written out by one plaintiff in presence of one defendant and seen by latter were admitted; exceptions overruled. *Commonwealth* v. *Porter*, 237 Mass. 1, 5, 129 N. E. 298 (1921): Prosecution in which evidence was admitted that defendant, when informed of improper acts in his house, kept silent; ruling held correct.

[32] 11 All. 123, 127 (1865).

it an occasion for secular debate with the sermonizer.[33] The same does not hold true, though, with respect to a political meeting where the first speaker hurls charges at the second speaker, who listens while awaiting his turn and is urged by the crowd to make answer when he finally rises to talk.[34] Here, on the other hand, is a typical case for denying a hostile inference from silence: A landlady answering her front-door bell claimed to have been pushed aside by employees of an instalment dealer, who entered and went upstairs, intent upon seizing furniture bought by a lodger whose payments were overdue. The ruffled landlady—according to her case, in the hearing of the intruders—described her mistreatment to visitors occupying a nearby room. Exceptions sustained because the jury were allowed to take into consideration the silence of the furniture-seizers.[35]

From the very beginning there has been a tendency to hold that where a man is under arrest or legal restraint, his silent reception of accusations should not be deemed an admission. At first the argument is perhaps only that the nature of the particular situation negatived any claim of proper occasion to reply.[36] The later arrest cases seem to have produced a hard and fast rule of exclusion.[37] This will be referred to again. Incidentally, if there is reasonable dispute as to whether an arrest preceded the alleged tacit admission, the trial judge may not assume the responsibility of finding that there was no arrest, but must submit the question to the jury.[38]

So far we have dealt only with adoptive admissions by silence

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[33] But there are sermons and sermons. In 1911 the late Ezra R. Thayer told of one preached during a political campaign. The minister inveighed against Senator Lodge and said that the Senator did not represent the people of Massachusetts. Whereat a leading parishioner, who had been squirming in his front pew for some time, spoke up firmly: "There are two views about *that*."

[34] *Warner* v. *Fuller*, 245 Mass. 520, 527, 139 N. E. 811 (1923).

[35] *Drury* v. *Hervey*, 126 Mass. 519, 520, 522 (1879). Other cases may also be listed here. *Larry* v. *Sherburne*, 2 All. 34 (1861): Action on bill for labor performed; defendant called witness to testify that witness offered plaintiff payment of bill [and plaintiff was silent?]; admitted; exceptions sustained on ground that plaintiff might reasonably refrain from answering an intruder. *Commonwealth* v. *Densmore*, n. 7 *supra*. *Commonwealth* v. *Roberts*, n. 11 *supra:* Prosecution for manslaughter in stabbing affray; prosecution allowed to give evidence that X who was present said, apparently during the affray: "Look out; they have got knives"; exceptions sustained on this and other points, the opinion saying that there was no occasion for defendants to answer X even if they heard him. *Whitney* v. *Houghton*, 127 Mass. 527, 529 (1879): Contract for breach of warranty of a cow; plaintiff, while impeaching an expert witness for defendant, testified that witness had told him the cow was sick before sale; defendant attempted to show that witness, when subsequently interviewed by plaintiff, said that he knew nothing about case and plaintiff did not allude to earlier talk with witness; this evidence of defendant's excluded; exceptions overruled on ground that plaintiff was not bound to enter into discussion with witness.

[36] *Commonwealth* v. *Kenney*, n. 2 *supra*.

[37] *Commonwealth* v. *Walker*, 13 All. 570 (1866); *Commonwealth* v. *Brown*, 121 Mass. 69, 74, 80 (1876); *Commonwealth* v. *McDermott*, 123 Mass. 440 (1877); *Commonwealth* v. *Spiropoulos*, 208 Mass. 71, 74, 94 N. E. 451 (1911); *Commonwealth* v. *Goldberg*, n. 22 *supra; Commonwealth* v. *Anderson*, 245 Mass. 177, 187, 139 N. E. 436 (1923).

[38] *Commonwealth* v. *Gangi*, 243 Mass. 341, 345, 137 N. E. 643 (1923).

when A and B are face to face, or at least within hearing distance. What if B writes A an accusing letter and A makes no reply? The general Massachusetts rule is that A's opponent may not claim an adoptive admission.[39] Our cases do not state very clearly the reasons for this distinction between the written and the spoken word. It seems a commonsensible recognition that pen pushing is harder and less universally practised than tongue wagging, and that the written response to a written communication is far less spontaneous than an oral exchange.[40] Perhaps, too, the wordless admission in correspondence is less easily found because we usually lack evidence of A's expression and conduct after receiving B's letter. Certainly several of the cases breaking away, or appearing to break away, from the ordinary letter rule stated above are those where oral colloquies or meetings have followed written communication.[41] Indeed, so important does the Supreme Judicial Court deem subsequent conversational reference to letters that it rejected an excellent alternative consideration in *Kumin* v. *Fine*.[42] This was an action against the indorsers of promissory notes, who defended on the ground that their indorsements were for plaintiff's accommodation and that he had agreed to hold them harmless. The trial judge excluded four unanswered letters written by plaintiff to one defendant in which the writer stated that he should look to the addressee for payment if the maker did not pay. Exceptions

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[39] *Commonwealth* v. *Eastman*, 1 Cush. 189, 195, 206, 208, 215 (1848), unanswered letters found in addressee's possession; *Fearing* v. *Kimball*, 4 All. 125 (1862), good statement of rule; *Percy* v. *Bibber*, 134 Mass. 404 (1883); *Callahan* v. *Goldman*, 216 Mass. 234, 237, 103 N. E. 687 (1913); *Pye* v. *Perry*, 217 Mass. 68, 71, 104 N. E. 460 (1914); *Jennings* v. *Wall*, 217 Mass. 278, 282, 104 N. E. 738 (1914); *Arcade Malleable Iron Co.* v. *Jenks*, 229 Mass. 95, 101, 118 N. E. 288 (1918); *Wagman* v. *Ziskind*, 234 Mass. 509, 511, 125 N. E. 633 (1920); *Curtis* v. *Boston Ice Co.*, 237 Mass. 343, 345, 352, 129 N. E. 444 (1921); *Wilson* v. *Davison*, 242 Mass. 237, 241, 136 N. E. 354 (1922), phrasing the rule too broadly; *National Wholesale Grocery Co.* v. *Mann*, 251 Mass. 238, 244, 146 N. E. 791 (1925); and *Morrison* v. *Tremont Trust Co.*, 252 Mass. 383, 388, 147 N. E. 870 (1925). Probably *Smith* v. *Abbott*, 221 Mass. 326, 331, 109 N. E. 190 (1915), should be included here because the only reply to the assertive letter was an acknowledgment of its receipt which referred the writer to counsel.

[40] 2 Wigmore on Evidence (2d ed., 1923), § 1073 (3).

[41] *Dutton* v. *Woodman*, 9 Cush. 255, 262 (1852): Issue was whether defendant was member of a partnership; plaintiffs called as witness a former salesman for this partnership who testified that October 12, 1848, he wrote defendant a letter asking whether latter had become a partner; no reply in writing; in January, 1849, witness talked to defendant who said he received letter, did not think answer necessary, and would neither admit nor deny partnership; letter excluded; plaintiffs' exceptions sustained. *President, etc., of Greenfield Bank* v. *Crafts*, n. 22 *supra*. *Harrod* v. *McDaniels*, 126 Mass. 413, 415 (1879): Case involving later dealings. *Commonwealth* v. *Neylon*, 159 Mass. 541, 543, 545, 34 N. E. 1078 (1893): Prosecution for liquor offense; prosecution called as witness a liquor dealer's bookkeeper, showed him an unreceipted bill for liquor to defendant, had him testify that he supposed he made and mailed this bill to defendant according to usual practice, and that defendant had, since May 1, 1892 (bill dated July 1, 1892), been about five times in dealer's place of business without witness ever having heard him talk about the bill; the bill had been found on defendant's premises; held that foregoing evidence and bill were properly admitted; majority opinion. *Traders' National Bank* v. *Rogers*, 167 Mass. 315, 320, 45 N. E. 923 (1897): Since defendant said "That note will be paid," this case may belong with cases of ambiguous response; but foregoing statement might be considered equivalent to silence with respect to defendant's liability.

[42] 229 Mass. 75, 118 N. E. 187 (1918). *Cf. Harrod* v. *McDaniels*, n. 41 *supra*.

were overruled, although these letters referred to prior notes and *after the letters were received the defendants indorsed renewal notes, the latter being the instruments upon which action was brought.* But even in this Commonwealth there are some instances of tacit admissions based on written matter without oral accompaniment or sequel.[43]

We have now come to the last groups of decisions, namely those where A responds ambiguously to B, or flatly denies B's assertion. It is a striking fact that very few denials have seemed to the Supreme Judicial Court unqualified enough to demand exclusion of the evidence. Hence the ambiguous cases contain several attempted denials, and the two decision groups are best treated together. Start with one of the rare successful denials: A priest sued his archbishop for slander and wrongful removal from his position. The archbishop asserted misconduct by the priest in going to a house of illfame. Plaintiff replied that he made the visit while looking out for the welfare of some nieces committed to his charge. A witness for the archbishop was allowed to testify that at an interview with plaintiff, attended by three nieces and plaintiff's brother, witness accused plaintiff of making improper advances to one niece; that plaintiff denied the charge; and that the niece reit-

[43] There is, for example, frequent intimation that if a party fails to answer letters forming part of a continuous correspondence to which both sides have contributed, implied admissions may reasonably be found. Such a situation existed in *Eveland* v. *Lawson*, 240 Mass. 99, 103, 132 N. E. 719 (1921), but the court ruled very cautiously, taking advantage of the fact that the record did not contain the entire correspondence. *Stevant* v. *Wallack*, 141 Mass. 119, 121, 122, 4 N. E. 615 (1886): Contract for goods alleged to have been sold defendant; plaintiff allowed to give evidence that shipments were made to defendant in cases marked for him and that bills, statements, demands, drafts, and the like were sent defendant who made no response; verdict for plaintiff; only relevant exception appears to have been to part of charge about effect of marking cases; exceptions overruled. *Bertha Mineral Co.* v. *Morrill*, 171 Mass. 167, 168, 50 N. E. 534 (1898): Similar to preceding case. *Sercombe-Bolte Manufacturing Co.* v. *John P. Lovell Arms Co.*, 171 Mass. 175, 177, 50 N. E. 535 (1898), should be consulted in connection with the two preceding cases. *Lamson* v. *Varnum*, 171 Mass. 237, 50 N. E. 615 (1898): Action for dental services rendered defendant's minor son; plaintiff offered evidence that he sent defendant statements for services rendered and received no reply; held proper evidence to sustain verdict for plaintiff. *Cf. Stimpson* v. *Hunter*, 234 Mass. 61, 65, 125 N. E. 155 (1919). See also *Auringer* v. *Cochrane*, 225 Mass. 273, 114 N. E. 355 (1916), where plaintiffs had done dressmaking work for defendant's minor daughter on representations of defendant's wife that her husband was responsible; evidence admitted that plaintiffs sent defendant a bill at the end of the first month's trading and received no reply; also that they repeated their demands at the ends of the second and third months of trading; held defendant had notice of the pledging of his credit after the first month and was bound to repudiate promptly; consequently he was liable for expenses incurred during second and third months. *Welch* v. *McNeil*, 214 Mass. 402, 406, 101 N. E. 985 (1913): Action in which plaintiff sought to hold defendant accountable for certain sand kept in a large pile on premises which defendant often visited; plaintiff gave evidence that he displayed for some time upon this pile a sign "sand for sale"; held that this evidence might be found to show an admission by defendant of plaintiff's title if defendant knew of the sign and did not object to it. *Barry* v. *MacNeill*, 249 Mass. 279, 281, 143 N. E. 901 (1924), is a somewhat peculiar case. It was an action by a lawyer for the value of services alleged to have been rendered defendant at his request; evidence was admitted tending to prove that plaintiff telephoned defendant, described what he had done, and asked for records from defendant so that he could complete the work; also that he wrote defendant in confirmation of this oral communication and received no reply; copy of plaintiff's letter admitted; verdict for plaintiff; exceptions overruled, the opinion saying that jury might have found the letter to have been written as part of plaintiff's services. Viewed in this light the admission of the letter does not appear to involve any hearsay problem.

erated it. Exceptions sustained; the evidence was wrongly admitted, for plaintiff's denial went to both statements.[44]

Now let us shift to allegedly ambiguous responses. A dentist rendered services to a minor, and sent the father a bill running to the son. The father's reply was: "You wont (sic) get any money on this bill for quite some time yet." Held no admission.[45] This is our last case of victory for the objecting party. In *Carroll* v. *Carroll*,[46] after a liability on the part of defendant had been asserted, his sister told him that plaintiff would sue and take his house in satisfaction. His reply included a remark: "She can't do it, the house don't belong to me." Held properly left to jury. The famous case of *Attorney General* v. *Pelletier*[47] also contains an implied admission based upon an evasive response. A witness testified that in the presence of respondent and X the witness recited a long conversation he had had with X. It included statements of fact damaging to respondent. These the respondent did not deny, but went off angrily on a tangent. A criminal prosecution furnishes a third example. Defendant responded to inquiries or approaches thus: "Supposing I told you, etc., etc. . . . I am not going to talk before a crowd . . . this means twenty years to me." Held rightly sent to the jury.[48] These decisions seem sound, and so do other analogous ones outlined below.[49]

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[44] *Fitzgerald* v. *Williams*, 148 Mass. 462, 464, 466, 20 N. E. 100 (1889). *Cf. Commonwealth* v. *Robinson* 165 Mass. 426, 428, 43 N. E. 121 (1896): Prosecution for indecent assault; police witness allowed to testify that after arrest he accused defendant of assaulting children, which defendant denied; guilty; exceptions overruled because no prejudice caused defendant by this evidence, which came in as an incident of a longer conversation. In *Sargent* v. *Lord*, 232 Mass. 585, 587, 122 N. E. 761 (1919), plaintiff tried to catch the court in a booby-trap. He had written defendant a self-serving assertive letter September 10, 1917. Defendant had answered September 12, 1917, referring to plaintiff's letter and in substance denying its assertions. Plaintiff first put defendant's letter in evidence and then offered his own as being an explanatory document. The trial court permitted him to do this, but the Supreme Judicial Court sustained the defendant's exceptions.

[45] *Stimpson* v. *Hunter*, n. 43 *supra*.

[46] 262 Mass. . . ., 159 N. E. 517 (1928).

[47] 240 Mass. 264, 323, 134 N. E. 407 (1922).

[48] *Commonwealth* v. *Sherman*, 234 Mass. 7, 12, 124 N. E. 423 (1919).

[49] *Hayes* v. *Kelley*, 116 Mass. 300 (1874): Contract for goods sold in which defendant asserted the charges were incorrect; plaintiff gave evidence that bills of particulars were presented to defendant from time to time; once defendant said that not all his credits were shown; again he directed the messenger to leave the bill in a closet and remarked that when he got ready he would see about it; jury instructed that under such circumstances defendant's conduct might be such as to warrant a finding that plaintiff's bill was correct; defendant's exceptions overruled. *Commonwealth* v. *Brown*, n. 37 *supra*: Indictment for illegal operations on X and Y; after defendant's arrest, X and Y made accusatory statements in his presence and defendant asked them if they had been previously operated on by another person; police evidence of this conversation admitted; guilty; exceptions overruled. *Kenyon* v. *Vogel*, 250 Mass. 341, 343, 145 N. E. 462 (1924): Action for damages caused by automobile collision; evidence admitted that chief of police asked the driver of defendant's automobile for whom he worked, and the driver replied that he worked for defendant "on that Sunday"; defendant was present, at first kept silence, and later said he had to have this driver because his car went too fast; held no error. *Surrette* v. *Hamel*, 254 Mass. 171, 149 N. E. 710 (1925): Another automobile collision case involving the question of the driver's agency; defendant's admissions and failures to answer leading questions by chief of police deemed sufficient to support verdict for plaintiff; plaintiff's exceptions to directed verdict for defendant sustained.

The attempted denials give much more trouble. Here is a succession of nine criminal cases, in every one of which submission to the jury was sustained:

1. *Commonwealth* v. *Trefethen.*[50] Prosecution for murder. Evidence was admitted that, after the victim's disappearance, defendant had been frequently questioned and accused of foul play over a period of covering 17 or 18 days. At times he displayed emotion; at times he denied the suggestions or charges; at times he was silent; and at times he made statements such as: "It must be a mistake"; "It is all a mistake"; or "It must be some other party." Exceptions sustained for different reasons. Compare case 4, below.

2. *Commonwealth* v. *Helfman.*[51] Prosecution for keeping and exposing intoxicating liquor with intent unlawfully to sell it. A police witness testified that with another officer he went to a store where he found defendant and his wife. In their presence he read aloud an anonymous letter containing a number of charges against the defendant. Defendant denied only one charge—namely, that there was liquor in the store at the time. "The evidence was competent upon the question whether the defendant's equivocal statement respecting the charge amounted to an admission of its truth in whole or in part."

3. *Commonwealth* v. *Hamel.*[52] Prosecution for an unlawful operation resulting in death. On the day of the death police officers aroused defendant at two a. m. and brought her into the victim's presence at a hospital. Apparently defendant considered herself under arrest. Before reaching the hospital defendant denied that she knew the victim by name. After seeing the victim, defendant said: "Yes, I know that girl. She is a girl that worked at one time in the Woman's Shop". The dying victim then accused defendant of having performed the operation, and the latter said: "The girl is out of her mind; she don't know what she is talking about." There was evidence that before reaching the victim's bedside an officer told defendant she must not do any talking or make any noise.

4. *Commonwealth* v. *Anderson.*[53] Prosecution for maintaining a common nuisance. Apparently two policemen in plain clothes entered defendant's tenement to see if she was breaking the law.

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[50] 157 Mass. 180, 196–200, 31 N. E. 961 (1892).
[51] 258 Mass. 410, 414, 155 N. E. 448 (1927).
[52] 163 N. E. 168 (1928).
[53] 220 Mass. 142, 146, 107 N. E. 523 (1915).

Later, seemingly on signal, a police sergeant entered. All three policemen testified (a) that the sergeant accused defendant of continuing to bring girls to the tenement for improper purposes, and (b) that one of the policemen first mentioned told the sergeant that defendant on his request had just caused two girls to come to the tenement. All this talk was in defendant's presence. The sergeant testified that defendant denied every statement, and said: "No, there never were any girls in the house." Defendant sought to have the entire conversation excluded. The holding seems to be that part (b) of the conversation and defendant's responses thereto were admissible. The jury might be allowed to determine whether the denials were true or false. So far as part (a) was a general accusation of crime, met by a denial of guilt, it was perhaps inadmissible. This distinction is based on *Commonwealth* v. *Trefethen*, case 1, above.[54] As defendant made only a blanket objection to *both* (a) and (b), appeal dismissed and exceptions overruled.

5. *Commonwealth* v. *Anderson*.[55] Prosecution for possession of burglar's tools. After arrest a police inspector talked with defendant. This inspector testified that he asked defendant about tools found in an automobile in which defendant had been riding. Defendant said: "I don't know anything about them." Inspector: "Are they yours?" Defendant: "No." Inspector: "Who owns this bag?" Defendant: "One of the other fellows must own that. It ain't mine." This seems the most significant part of a more extended conversation. Exceptions sustained on grounds other than an objection to its admission.

6. *Commonwealth* v. *Goldberg*.[56] Prosecution of four defendants for breaking and entering, and larceny. Testimony, presumably from police witnesses, admitted that after arrest written statements by two defendants were read to the other two, who were then invited to make statements. One of the latter pair said: "I have nothing to say, but I am not making any statement now until I see a lawyer. . . . Not exactly now. I will wait a few days." The other said: "I could not tell any statement now. . . . I haven't anything to say." Held no error to admit the written statements in connection with the foregoing responses; but exceptions sustained because judge charged that jury might decide whether latter pair of defendants ought to have made statements.

[54] The argument runs thus: A denial of guilt can tell *against* the defendant only if found false. But to find it false the jury must be convinced of guilt beyond reasonable doubt. And when that point is reached, further evidence for the prosecution becomes superfluous.

[55] Cited in n. 37 *supra*.

[56] Cited in n. 22 *supra*.

7. *Commonwealth* v. *Spiropoulos*.[57] Prosecution of two defendants for murder. Police testimony admitted that after arrest Peter Delorey (one defendant) in a police station repeated before James Mantir (the other defendant) a confession previously made. During the repetition Mantir several times called on Delorey to stop: "Stop, Peter! You lie! You lie! Peter, stop!" Ultimately Delorey urged Mantir to tell the truth, adding: "You know you cut her throat with a razor. You know her blood was on your hands." Silence for two minutes. Then a police lieutenant said: "What have you got to say to Peter Delorey's story now, Jim?" Mantir: "Me no talk, me no talk. I want to see my lawyer, I want to see my lawyer." Held evidence of confession and responses properly admitted against Mantir.[58]

8. *Commonwealth* v. *Zaidon*.[59] Prosecution for keeping and exposing intoxicating liquor with intent unlawfully to sell it. Police testimony admitted that at defendant's store and in his presence were a drunken woman with a bottle of liquor, and the woman's husband. The husband said to defendant: "You are selling liquor to my wife." Defendant: "I am not." Husband: "You are, she has some there now." Defendant: "I am not." Held that a blanket exception to the admission of any of this evidence should be overruled. The opinion mingles the ideas of full description of the incident, spontaneous exclamation by the husband, and implied admission by defendant.

9. *Commonwealth* v. *Hebert*.[60] Prosecution for an unlawful operation resulting in death. After arrest, defendant was brought before the victim, who accused him of having performed the operation. Being asked if he knew the victim, he said he had "no recollection of ever seeing this woman." Being then asked what he had to say about her accusation, he replied: "I have nothing to say." Held that defendant's first statement "was not a direct denial of her accusation, it was equivocal and evasive to such an extent that the evidence became admissible as an admission against him." Nor did his later answer make the evidence incompetent.

It is not suggested that any of these cases resulted in a miscarriage of justice. Our juries convict very few innocent men. At least cases 1 and 2 show a shifty attitude by the defendants which easily justifies the evidentiary rulings. Yet the reader is bound

[57] Cited in n. 37 *supra*.

[58] *Cf. Commonwealth* v. *Madeiros*, 255 Mass. 304, 313, 151 N. E. 297 (1926), where defendant called his accuser an insulting name and said: "I would like to kill you."

[59] 253 Mass. 600, 602, 149 N. E. 550 (1925).

[60] 163 N. E. 189 (1928).

to consider whether some of the other cases do not go a long way toward making the implied admission a trick or catch of criminal procedure, or more specifically of police procedure. Before arrest, a suspect has little chance to avoid the manufacture of such evidence if he permits an accuser to confront him. Whether he stands mute or makes reply, it may be all one except in the single case where he meets and flatly repels a direct and general accusation of guilt. Against charges of particular incriminating facts he has no such definite method of protection. After arrest, he gains the further privilege of refuge in utter silence—a privilege very likely conferred by the courts because of the numerous risks attending every other kind of conduct. If this trick or catch imperiled all guilty men as well as all innocent ones, it might in our present state of mind be accepted with little reluctance. But, in fact, it usually imperils only inexperienced persons. Those persons who may be termed experienced—and experience fairly enough implies the professional criminal—know the ins and outs of this procedure just as well as any policeman. Inexperience does not to anything like the same degree imply innocence, yet we should certainly suppose that most of the innocent men unfortunate enough to be suspected will fall in the inexperienced class.

The comment just made should not be construed as a general reflection upon the rule recognizing adoptive admissions. Such recognition is sound and full of common sense. But those applying the rule should never overlook its proper natural limits, or suffer considerations of broad policy to drop from view.

JOHN M. MAGUIRE.

CONNECTICUT PRACTICE AS TO SILENT DEFENDANTS.

A correspondent writes:

"In the recent Connecticut case of *State* v. *Colonese*, 143 Atl. 561, 565 (1928), a criminal defendant did not take the stand in his own behalf. The court instructed the jury that no prejudicial inference should be drawn from this failure to testify. The case was carried up on other points, but the Appellate Court took occasion to express its disapproval of the instruction. The Connecticut statute relating to testimony by culprits says that 'neglect or refusal of an accused party to testify shall not be commented upon to the court or jury.' The opinion in the Colonese case says that a statute in this form leaves the jury entirely free to draw unkind inferences. But it must not be helped in this process by comment from the prosecutor or the judge. The phrasing of our Massachusetts statute is different."

THE FUNCTION OF THE ATTORNEY GENERAL, THE ADVISORY FUNCTION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT, AND THE JURISDICTION OF THE COURT, UNDER THE INITIATIVE AND REFERENDUM AMENDMENT.

In the opinion in *Thompson* v. *Secretary of the Commonwealth*, decided October 15, 1929, the court said:

> "At the outset, although neither party has presented it, a question of jurisdiction of the court arises. *We held* in *Anderson* v. *Secretary of the Commonwealth*, 255 Mass. 366, *where the petitioner sought by petition for mandamus to restrain the Secretary from placing an initiative petition before the people, on the ground that it related 'to religion, religious practices and religious institutions,' and was 'restricted in its operation to particular cities and towns,' that the certificate of the Attorney General that the measure was in proper form was decisive. Since the power to determine had been conferred upon him in unequivocal words, and no bad faith appeared, this court could not set it aside.* The force of that decision is not weakened by *Brooks* v. *Secretary of the Commonwealth*, 257 Mass. 91. The defect which it was then held prevented the Secretary from printing the ballots was aside from the matter certified by the Attorney General and was not within the authority conferred. *The decision whether an initiative petition related to the question of religion, religious practices and religious institutions, does not differ in kind from a determination whether an instruction relates to public policy.* We see no reason why if one may be left to the Attorney General for decision which is to be final, the other may not."*

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*THE FULL OPINION IN THOMPSON & OTHERS *vs.* SECRETARY OF THE COMMONWEALTH WAS AS FOLLOWS:

Suffolk. Argued *October 9*, 1928.—Opinion filed *October 15*, 1928. Present: CROSBY, PIERCE, CARROLL, WAIT, & SANDERSON, JJ.

The petitioner prays that this court by a writ of mandamus restrain the Secretary of the Commonwealth from printing on the ballot in several senatorial districts for the election in November next this question: "Shall the Senator from this district be instructed to vote for a resolution memorializing Congress for the repeal of the eighteenth amendment to the Constitution of the United States known as the Prohibition Amendment?"

The authority of the Secretary to place this question on the ballots is derived from G. L. c. 53, § 19, as amended by St. 1925, c. 97, which provides as follows: "On an application signed by twelve hundred voters in any senatorial district, or by two hundred voters in any representative district, asking for the submission to the voters of that senatorial or representative district of any question of instructions to the senator or representatives from that district, and stating the substance thereof, the attorney general shall upon request of the state secretary determine whether or not such question is one of public policy, and if such question is determined to be one of public policy, the state secretary and the attorney general shall draft it in such simple, unequivocal and adequate form as shall be deemed best suited for presentation upon the ballot. Upon the fulfilment of the requirements of this and the two following sections the state secretary shall place such question on the official ballot to be used in that senatorial or representative district at the next state election."

In the Anderson opinion, 255 Mass. 368, the court said:

> "While no measure that relates to religious practices, or religion, or religious institutions can be made the subject of an initiative petition, the Attorney General is required to certify that the measure is in proper form. Art. 48, The Initiative, §§ 2, 3. A petition is not in proper form if it falls within the exclusion. The Attorney General, therefore, is to pass upon this question before making his certification of approval or disapproval. This power is expressly conferred upon him in unequivocal words. The question, whether the preliminary requirements have been complied with, is for him to determine and his decision, in the absence of bad faith, is final. It can not be set aside by this court which can interpret, but can not override the organic law. . . .
>
> "It follows that the petition for mandamus in the first case, to restrain the Secretary of the Commonwealth from submitting the measure to the people, and the petition for certiorari in the second case, to quash the certification of the Attorney General, must be dismissed."

The opinion in the Anderson case was discussed in the MASSA-

The petitioner contends that the statute does not authorize the action complained of because the question posited is not "a question of public policy for the State of Massachusetts or for the citizens thereof, and is not included within the intent and meaning of the words 'question of public policy' as used in said statute."

At the outset, although neither party has presented it, a question of jurisdiction of the court arises. *We held in Anderson* v. *Secretary of the Commonwealth*, 255 Mass. 366, *where the petitioner sought by petition for mandamus to restrain the Secretary from placing an initiative petition before the people, on the ground that it related "to religion, religious practices and religious institutions," and was "restricted in its operation to particular cities and towns," that the certificate of the Attorney General that the measure was in proper form was decisive. Since the power to determine had been conferred upon him in unequivocal words, and no bad faith appeared, this court could not set it aside.* The force of that decision is not weakened by *Brooks* v. *Secretary of the Commonwealth*, 257 Mass. 91. The defect which it was then held prevented the Secretary from printing the ballots was aside from the matter certified by the Attorney General and was not within the authority conferred. *The decision whether an initiative petition related to the question of religion, religious practices and religious institutions, does not differ in kind from a determination whether an instruction relates to public policy.* We see no reason why if one may be left to the Attorney General for decision which is to be final, the other may not.

By the express words of the statute "The attorney general shall . . . determine whether or not the question is one of public policy." No provision is made for any appeal from his determination. It is manifest that the Legislature contemplated that uncertainty might arise whether the question of instructions related to a matter of public policy. G. L. c. 53, § 19, placed the duty of deciding its character upon the Secretary of the Commonwealth. St. 1925, c. 97, was passed to shift the burden to the Attorney General. It is often important that no time be lost in deciding whether a matter is proper to be placed upon the ballot. The Secretary must act in season to be able to present the ballots at the polling places at the moment fixed for the election. Fear that resort to the courts might result in injurious delay may well have led the Legislature to place final authority in the Attorney General; especially where no property or personal right of individuals could be affected by the result of the determination, and where the matter in which he is to act is within the power of the Legislature. Clearly the Legislature of its own motion might have addressed such a memorial to Congress.

In the matter before us the language of the statute is clear that the decision for the purpose of placing the question on the ballot rests with the Attorney General. As no question is made of the power of the Legislature so to memorialize Congress, nor of the good faith of the Attorney General, nothing is open on this record for the court's action.

Petition denied.

C. A. Parker, (*J. H. White* with him,) for the petitioners.
F. D. Putnam, Assistant Attorney General, for the respondent.

CHUSETTS LAW QUARTERLY upon August, 1926 (pp. 90–96), but there is more to be said.

If a court is about to exceed its jurisdiction because of mistaken interpretation of a statute, a writ of prohibition will lie to the Supreme Judicial Court to stop it. If a public officer fails to perform his legal duty for a similar reason, a petition for mandamus will lie to make him do it. If a municipal corporation is about to exceed its powers for a similar reason, it may be stopped by a taxpayers' suit or by some other method even if there is relatively little time for judicial action. The only method of raising certain questions as to the meaning of the poor debtor law, has been by a prerogative writ.*

Now on what grounds is the attorney general's unreasoned certificate given greater judicial force than the decision of any other court or tribunal which may conceivably exceed its powers because of mistaken interpretation of them?

The only grounds of decision are those above referred to. Let us test them with the language of the I. and R. Amendment, the meaning of which is to be studied and applied by the attorney general before he makes his certificate. Such a study may bring out other questions which have not yet been presented to the court but which may arise at later stages of I. and R. procedure and which are so related as to suggest necessary limits to the application of the Anderson opinion, and, to that end, its thorough reconsideration and possible reversal in future.

The fifty-eighth amendment, commonly known as "the I. and R.", opens with a paragraph called a "Definition". It reads:

> "Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the general court, to the people for their ratification or rejection."

It has been pointed out, in a discussion in the MASSACHUSETTS LAW QUARTERLY for July, 1924, page 48, that, while this definition reads in the form of a *reservation* of power to the people, yet the word "reservation" is rhetorical and when its language is analyzed in the light of the facts to which it refers, that it has no intelligible meaning except a specific limited grant of power to a

* *Henshaw* v. *Cotton*, 127 Mass. 60.

limited number of individuals to initiate something by signatures for the people to vote on. In other words a strictly limited amount of legislative power was separated from the general aggregate of power and a strictly limited concurrent method of invoking that power was created.

Following this definition is a more specific description of the meaning of this limited grant of power:

"THE INITIATIVE.

II. INITIATIVE PETITIONS.

SECTION 1. *Contents.*—An initiative petition shall set forth the full text of the constitutional amendment or law, hereinafter designated as the measure, which is *proposed* by the petition.

SECTION 2. *Excluded Matters.—No measure* that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, *shall be proposed* by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

Neither the provisions of this constitution embodied in article three, section two of the declaration of rights, nor this provision for their protection, *shall be the subject of* an initiative amendment.

No measure inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, *shall be the subject of* an initiative petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum *shall be the subject of* an initiative petition; *nor shall this article be the subject of such a petition.*

The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder."

The last clause, above quoted, of course, specifically recognizes the jurisdiction and the judicial duty of the court to test the valid-

ity of any initiated constitutional amendment or law which may be submitted to, and approved by, popular vote under the amendment. Neither the attorney general nor any one else is given any authority by the amendment to relieve the court of this responsibility thus expressly recognized. Accordingly, the validity of every initiated constitutional amendment or law thus submitted and voted upon may be challenged in the same way that any statute passed by the legislature may be challenged in any judicial proceeding in which the question of validity is involved. ***Neither the opinion in the Anderson case nor the Thompson case affect that jurisdiction and duty in any way, as the question was not before the court in either case.***

The statement, therefore, in the Anderson opinion that the attorney general's certificate "is final" as to a measure submitted to him in an initiative petition, necessarily means no more than "final" only as to the duty of the Secretary of the Commonwealth to place the question on the ballot. Whether it *can* mean even as much as that will be discussed later; but certainly it does not, and can not, affect the ultimate judicial consideration of the validity of the measure, if, and when, it may come before the court after an affirmative popular vote.

The provision relative to the attorney general appears as

"SECTION 3. *Mode of Originating.*—Such petition shall first be signed by ten qualified voters of the commonwealth and shall then be submitted to the attorney general, and if he shall certify that the measure is in proper form for submission to the people, *and* that it is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people within three years of the succeeding first Wednesday in December *and* that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth. The secretary of the commonwealth shall provide blanks for the use of subsequent signers", etc.

It is this provision of the amendment which the court interprets in the opinion in the Anderson and Thompson cases.

Now let us test the interpretation by a study of the constitutional intent as expressed in the language of the amendment already quoted.

The first thing to be noticed is that, while Section 3 carefully specifies three *separate* subjects for certification, the court, in the

Anderson opinion, seems to classify the second and third subjects as included in the first subject of "proper form".

The "Definition" above quoted defines the initiative as,

> "The *power* of a specified number of voters to *submit* constitutional amendments and laws to the people for approval or rejection."

SECTION 1 provides that,

> "An initiative petition shall set forth . . . the measure which is *proposed* by the petition."

SECTION 2 expressly limits the "*power* of a specified number of voters" referred to in the "Definition" by providing that,

> "No measure that relates to religion, etc., . . . shall be *proposed* by an initiative petition."

and,

> "Neither the eighteenth amendment . . . nor this provision for its protection shall be the *subject* of an initiative amendment,"

and,

> "No proposition inconsistent with any one of the following rights of the individual . . . shall be the *subject* of an initiative or a referendum petition,"

and,

> "No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the *subject* of an initiative petition nor shall this section be the *subject* of such a petition."

It appears expressly, therefore, that not only are initiated measures, if approved by popular vote, still subject to the "limitations" which are applicable to the "legislative power of the General Court" to be judicially applied when occasion arises, but the excluding clauses expressly prohibit, as a matter of constitutional law, the *proposing* by initiative petition of certain questions or the making of those questions the "*subject*" of such a petition.

These specific constitutional provisions relate, not to matters of form, but to constitutional substance by the express language of the amendment. Why are they questions of substance? Why was the prohibition against the *proposing* of certain matters and against

making them the *subject* of a petition, adopted, in addition to the limitations on the legislative power of the voters in dealing with such questions after they are proposed?

For any one who heard, or who has read, the debates on the initiative and referendum contained in Volume II of the "Debates of the Convention", or who thinks out the practical situation, the answer to this question will, I think, stand out clearly. In the words of leading members of the convention, who introduced and supported the excluding clauses, the purpose was to protect certain subjects from *"attack"* by the signature method. As one delegate pointed out, the practical effect of an initiative petition which is finally presented to the voters is that "The entire population, the whole voting population, shall be put to the burden of studying questions, and the commonwealth put to the burden of printing pamphlets and getting out ballots for them". Obviously, the expense of preparing the signature petitions and the ballots on these questions and also of printing the pamphlets containing the text and the arguments, pro and con, if any, which must be sent to every one of the voters of the commonwealth runs into large figures. Also, the expense and labor of campaigns, for and against the proposed measures, imposes upon citizens, who try to meet their responsibilities as citizens, a heavy burden. The burden and expense of these things are naturally to be considered in connection with studying the practical intent as to the placing on the ballot of measures which would be invalid if approved by the voters.

But by far the most important purpose of the express provision against the *proposing* of measures relating to certain subjects, or of *making them the subject* of an initiative petition, was to withhold from the petition-signers the power of public agitation of certain fundamental subjects by means of signature-collecting and the subsequent forcing of the voting population into political campaigns on the subjects. Take, for instance, the subject of religion and the provisions in regard to it in the bill of rights,—one of the delegates in debate said, "Massachusetts is a state particularly liable to religious controversies. Do we wish to invite them by the adoption of the constitutional initiative?" (Debates, Vol. II, 128). The convention, and subsequently the people at the polls, answered this question with an emphatic, "No", by the express provision, already referred to, which prohibits not only the passage, but the *proposing* of such measures by the initiative process.

How can the constitutional purposes of the people, as well as of

the convention, to prevent by law the public agitation of religious and other excluded subjects by the initiative method be effectually prevented if there is no opportunity to invoke the jurisdiction of the court, whose function is to interpret the constitution and see that the constitutional purposes of the people are carried out, so far as the court is concerned, by explaining by judicial decision what those purposes are, instead of leaving them to the attorney general to explain?

Now let us follow the initiative procedure some steps further and see what, if any, peculiar and unexpected situations may be produced by the view expressed by the court in the opinions in the Anderson and Thompson cases.

After the attorney general certifies (without the necessity of giving his reasons) the Secretary of the Commonwealth provides printed blanks for the first ten signers to use in collecting signatures. When the required number of signatures are collected, the secretary transmits the proposed measure to the House of Representatives where it is referred to a committee and, after hearing, the committee must report on the measure, "its recommendations and the reasons therefor in writing. Majority and minority reports shall be signed by the members of said committee". Thereupon, the legislature may, if it does not pass the proposed measure, propose a substitute which shall be submitted to the people upon the ballot as an alternative for the proposed initiative measure, whether it be a constitutional amendment or a law.

Now let us suppose that somebody raises a question of constitutionality, either in the majority or minority reports of the committee or in the debate in one or both houses. Each house of the legislature has a right to request the opinion of the attorney general and exercises that right from time to time. Suppose his opinion is requested as to constitutionality of the initiated measure which he or his predecessor has already allowed to be initiated by his original certificate. Suppose he changes his mind after further study at the request of the legislature and thinks that the original certificate was mistaken, can he prevent or can the legislature prevent, the measure from going on the ballot after it has reached this stage without applying to the courts? If so, how and why?

The court in the Anderson opinion says that the attorney general's certificate that a measure is in proper form is "final" as to measures appearing on the ballot. Section 3 of the initiative, already quoted, obviously contemplates that the attorney general's

"final" certificate is to be made when the measure is proposed by the first ten signers and before the blanks are issued for the collection of signatures. In every other department of government, however, there is some legal opportunity for somebody to change his mind. One would suppose that the attorney general,—the people's lawyer,—would be in a constitutional position to change his mind upon more careful study and advise the Secretary of the Commonwealth and the legislature that his original certificate or that of his predecessor was a mistake as a matter of law. Do the opinions in the Anderson and Thompson cases contemplate any such possibility? The court has not decided that question and until it does it seems necessary to assume that the right of the people to a fully considered interpretation of their constitutional provisions involves the right of their attorney general to change his mind.

However that may be, let us go a step further and assume that the legislature is not convinced by the opinion of the attorney general, whatever it may be, and in the course of its deliberations requests the advisory opinion of the Supreme Judicial Court, under the constitution, as to the constitutionality of the proposed initiative measure which has been certified by the attorney general as in proper form to go upon the ballot. The justices would be constitutionally bound to express their opinions, just as the attorney general would be bound to express his opinion, when requested. We find it difficult to believe that the justices under such circumstances could state to the legislature that the unreasoned certificate of the attorney general at the time when the petition was first proposed, *finally* settled the question as to whether this matter should go upon the ballot and that, *therefore,* the legislature was not entitled to the justices' opinions as to whether the attorney general was right and as to the validity of the measure under the excluding clauses if approved by the people; and, consequently, whether the petition was legally before the legislature so that they were constitutionally bound to consider and act upon it as specified in the amendment, and to consider whether to submit a "legislative substitute" in the manner provided. Certainly the court has had no such question before it to decide thus far, and it is difficult to picture the justices, who are the constitutional advisers of the legislature, when requested, assuming any such attitude.

Let us suppose then, that the justices, in considered advisory opinions, are unanimous that the proposed measure, certified by the attorney general, would be unconstitutional because it was within

the excluding clauses above quoted so that it was not within the power of the petition signers to require, either the legislature or the people, to vote upon the question under the I. and R. machinery. What would happen then? Would the question go on the ballot or not? Suppose that the Secretary of the Commonwealth refused, in the light of such an opinion, to place the question on the ballot, and the petitioners applied for mandamus, would the court, in spite of its advisory opinions, still say that the attorney general's certificate was "final" and that, as he had certified, it was the constitutional duty of the secretary to place the question on the ballot and that th court had no jurisdiction to revise the attorney general's certificate even though the attorney general himself may have changed his mind? Would the court grant the writ of mandamus to the secretary? If not, why not? Suppose the legislature which must make up its own mind as to its Constitutional duties, considered the attorney general's certificate mistaken, is that certificate "final" as to them even if the justices should advise them that they were right and the certificate was wrong? Must the question still go on the ballot?

Suppose the secretary, under the opinions in the Anderson and Thompson cases, considered it his duty to place the question on the ballot. Would the court, in the face of its own advisory opinions, refuse to consider judicially the questions upon which it had already expressed advisory opinions, and allow the Secretary of the Commonwealth to place it on the ballot and the people to be put to the expense, agitation and confusion necessarily involved in a campaign upon such issues which would be still more confused because of the conflicting constitutional opinions expressed? Would that situation be in accordance with Massachusetts traditions of orderly government? Would the constitutional purpose that the measure involved should not be "proposed" or made "the subject of" an initiative petition be carried out? If so, how?

Is there anything in the I. and R. Amendment which contemplates any such situation and, yet, under the opinions in the Anderson and Thompson cases, is it not a perfectly possible situation,—not only possible, but, in the course of time, probable under unforeseen political conditions?

It is not only a presumption, but is a historical fact, which stands up like a monument from both sides of the debates that the idea of the I. and R. Amendment was that it should be an orderly proceeding to supplement our system of representative government,

and guarded, so far as practicable, to protect the community from undesirable agitation of subjects which were excluded from its operation. This purpose is emphasized as a matter of commonsense by the fact that the court has the judicial duty of passing upon the validity, not only of laws, but of constitutional amendments which may be submitted. Such an amendment is described in IV, sections 1, 2 and 3, as "a proposal" for amendment. Turning back to the passages already quoted which restrict the power granted to the petition signers by saying that no measure that relates to religion, etc., "shall be proposed" or shall be "the subject of" such a petition, it is difficult to see how the court can refuse to interpret and apply so definite a provision of the constitution. It takes from one to two years to get an initiated law and from three to four years to get an initiated constitutional amendment on the ballot, so that there is always time for advisory opinions and judicial proceedings before the ballots are prepared.

Turning now to the referendum which may be invoked "upon any law enacted by the General Court which is not herein expressly excluded", section 2 of this part of the amendment provides:

> "*Excluded Matters.*—No law that relates to religion, practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition."

There is no provision requiring the attorney general to certify that a referendum petition is not within the excluded matters. The attorney general is given no function in regard to such questions except to determine the *description* of the law as it is to appear upon the ballot. (See "General Provisions" III.) Accordingly, the question whether a referendum petition violates the excluding clause can, clearly, be brought before the court by some appropriate proceeding to test the right, or duty, of the Secretary of the Commonwealth to place it on the ballot. The question, whether or not it is a subject for referendum may also come before the court at any time thirty days after the approval of the act by the governor, because, if it is not subject to referendum, it will take effect in thirty

days, or sooner if it is an "emergency measure"; whereas, if it is subject to a referendum, it will not take effect for ninety days.

It would certainly seem a curious result if the court could be asked to interpret the excluding clause as to a referendum petition before a question is put on the ballots but could not be asked to interpret the broader and far more important excluding clauses relative to initiative petitions, simply because an attorney general has given a certificate. If, as seems clear, the question as to the excluding clauses under the referendum, are questions of constitutional substance, and not mere questions of form, it is difficult to understand how similiar questions under the initiative excluding clauses can be mere matters of form and not of substance. It would seem that before such a constitutional interpretation was finally adopted by the court a study of the I. and R. Amendment from many points of view and its history, as shown in the debates, and a fully reasoned opinion based upon the express language of the different parts of the amendment and their relation to each other and to the other parts of the constitution, might reasonably be expected by the bar and by the public, instead of two opinions as brief as those in the Anderson case and in the Thompson case, one of which was handed down within nine days of the argument and the other within six days after the case was submitted without argument on the point, at a time when the court was known to be under heavy pressure of work because of the illness of the chief justice.

We are still of the opinion that the question whether an initiative petition is within the excluding clauses of the Initiative and Referendum Amendment is essentially, not a matter of form, but a question of substantive constitutional law which can not be decided finally by the attorney general because he is not a judicial officer under the constitution. A recognition of him as a judge would seem to be inconsistent with the eighteenth, twenty-ninth and thirtieth articles of the bill of rights and with the first article of Chapter III of the constitution and with the Initiative and Referendum Amendment itself. The Initiative and Referendum Amendment contains nothing which alters or qualifies those provisions of the original constitution. The excluding clauses in the I. and R. Amendment are additions to the bill of rights of the people of Massachusetts. The prohibition in the excluding clauses is as absolute as any provision in the original bill of rights. Accordingly, while the court may, temporarily, as a matter of *practice*, in view of the opinion in the Anderson case, decline to exercise its constitutional

jurisdiction in such cases, we respectfully submit that there is no doctrine of *stare decisis* known to the law which can make the attorney general permanently a judicial officer as to substantive questions of constitutional law or statutory law in general. We say "statutory law in general" for the question whether something is or is not a "question of public policy" under the statute referred to in the Thompson case seems to differ in degree, at least, from other questions and that we understand to be the extent of the *decision* of the court in the Thompson case. The reference to the Anderson opinion was unnecessary for *that* decision.

The Supreme Court of the United States some years ago decided that sixty years or more of judicial practice in placing men on probation without authority of Congress did not legalize the probation practice in the Federal Court. In the same way, we respectfully submit that this brief decision as to practice cannot permanently turn questions of substance under the Initiative and Referendum Amendment into questions of form or turn the attorney general into a final court of appeal on such questions.

The practical result of the opinion in the Anderson case, if taken literally, which does not seem to be generally appreciated, is that the power of interpreting the constitutional provisions of far-reaching importance in the Initiative and Referendum Amendment would be left to the 10 self-appointed original initiative petition signers in the first instance *and* the attorney-general. These eleven men, of whom only one has any public official responsibility (and he is not a judge, but a branch of the executive department of the government who may act through his assistants) could, under the Anderson opinion, literally subject the voters of the Commonwealth to a campaign upon some question. If they should carry their proposed initiative law, they could subject the entire population of the Commonwealth to the consequences of that law without any opportunity being given to any citizen of the Commonwealth who may be affected to raise *in advance* the question of constitutional law before the great tribunal specially created by the constitution for the decision of such questions of law. We submit that no individuals have ever before been given such far-reaching powers in Massachusetts since 1780 and that there is nothing in the history and debates of the constitutional convention indicating an intention to modify the articles in the constitution already referred to in regard to judicial officers or to classify the attorney general as a fourth co-ordinate department of the government with "final" judicial powers as to

the interpretation of the language of one amendment to the constitution so that his decision can not be reviewed by the seven justices of the Supreme Judicial Court although his opinion as to every other part of the constitution is not "final".

The legislature is entitled to the constitutional advice of the justices when they ask for it before legislating. The Supreme Judicial Court is the people's court. Why cannot its jurisdiction be invoked to explain the constitution before the people are asked to vote on a measure which may be unconstitutionally submitted to them and which may have to be held invalid later, even if approved by a popular vote. Surely a measure, the proposal of which by the signature method, is expressly prohibited by the I. and R., cannot gain any legality by being voted on.

These aspects of the situation were neither suggested by the counsel nor considered by the court in the Anderson opinion or in the opinion in the Brooks case. They were not referred to by the court in the opinion in the Thompson case quoted above. Until these aspects of the problem are argued before the court and considered by the court in a reasoned opinion, we do not see how the opinion in the Anderson case or the opinion in the Thompson case above quoted can be fairly regarded as permanently fastened upon the people of Massachusetts merely by the doctrine of *stare decisis*. As Lord Acton said in his appreciation of the argument of James Otis in 1761, "There are principles which override precedents".

The actual *decision* in the Thompson case *allowing the proposed question to appear upon the ballot* at the state election is, in our opinion, sound regardless of the reasoning upon which that decision was arrived at. The merits of the question of statutory interpretation as to whether the question proposed was one of "public policy" was discussed in the MASSACHUSETTS LAW QUARTERLY for August, 1928, pages 95–97. This question was also more fully discussed in the opinion of the attorney general which preceded and led to the petition for mandamus which was denied in the Thompson case. As the merits of this question were not considered in the opinion of the court, we reprinted in the QUARTERLY for February the full reasoned opinion of the attorney general and the brief in support of it in the Thompson case, which will, perhaps, serve as a precedent for the future in that office although we are not aware of any doctrine of *stare decisis* applicable to the rulings of an attorney general. It would be rather extraordinary if such a doctrine should have to be developed in view of the apparent elevation

of the attorney general, by judicial suggestion, to the position of a court.

The immediate questions involved thus far, in the Anderson case and in the Thompson case, are of relatively minor importance as compared with the possible questions of the future which may be presented to the attorney general. We believe that the problem is so serious as to demand the hardest thinking of the bench and bar and an absolutely unrestricted reconsideration of the whole problem by the court on some future occasion in fairness to the interests of the people of the Commonwealth, present and future. The question reaches to the stability of the constitutional foundations of the commonwealth. The excluding clauses were framed by the convention, not as matters of "form", but of what, in early days, were called "fundamentals".

In discussing these problems with a leading member of the bar, he said, "I do not understand the I. & R." That probably reflects the state of mind of a good many lawyers and judges who have not become accustomed to the ideas expressed in the forty-eighth amendment and their relation to the rest of the constitution. The debate out of which the amendment grew covers more than one thousand pages of Volume II of the Debates of the Convention of 1917. Continuing the conversation, the lawyer, above referred to, asked, "Is there anything to prevent the sovereign from declaring that the attorney general shall in fact exercise judicial power from which there is no appeal? Could not a constitution be written giving some officer the final decision in certain matters?"

This question may arise in the minds of others. It suggests three questions; first, a question of power, second, a question of method of exercising the power, third, a question of interpretation of the amendment under consideration.

First, it may be, as was argued (if we remember correctly) by the solicitor general of the United States in the case involving the validity of the eighteenth amendment, that the people, by amendment, could abolish the Supreme Court or transfer its functions to the president or the senate or the attorney general, but we doubt it, at least without a Constitutional Convention, and

Second, it is not clear how it could be done without leaving the government unworkable and in Massachusetts where we have a constitution in two distinct "Parts"—a "Declaration of the Rights of the Inhabitants of Massachusetts" and a "Frame of Government," it seems clear that the frame of government could not be

changed in such a way as to transfer the functions of the courts to the attorney general, or somebody else, without a clearly expressed intention to amend the twenty-ninth and thirtieth articles of the bill of rights. We do not think they can be repealed or amended by inference if any other reasonable inference is possible.

Third, on the question of interpretation, the I. and R. contains no ground for inference of an intention to change the twenty-ninth and thirtieth articles, but on the contrary, specifically protects them. The convention carefully refrained from touching the bill of rights in any article except the eighteenth. We submit that the natural and reasonable inference is that the attorney general's certificate is simply formal advice to the Secretary of the Commonwealth as to his duty which is to be followed unless the attorney general changes his opinion or the court issues an order to the contrary.

There is a well-known cardinal rule of construction that, where the language of an act will bear two interpretations, that one which is clearly in accordance with the provisions of the constitution is to be preferred. See *Knights Templar Indemnity Co.* v. *Jarmon*, 187 U. S. at p. 205. For the same reason, it must surely be a cardinal rule of construction as to the meaning of an amendment to the Massachusetts "Frame of Government" that it shall be so interpreted as to be consistent with the underlying principles of the bill of rights unless there is an unmistakable intention expressed to change the bill of rights.

In MASSACHUSETTS LAW QUARTERLY for July, 1924 (pages 35-51) the question is discussed whether the amendment authorizes an initiative petition for the calling of a constitutional convention. That question involves, not merely the interpretation of the excluding clauses, but the broader question as to the scope and meaning of the word "law" in the "definition" of the I. and R. and the distinction between the *legislative* power, part of which is distributed by the amendment, and the broader extra-constitutional *"representative"* power of the General Court, the existence of which is recognized but not regulated by the constitution and no part of which is distributed or affected by the amendment. Surely *that* can not be a mere question of "form" for the attorney general to decide, "finally". This is no moot question. It has arisen already, but did not have to be decided. It may arise again at any moment and when it does, it will be one of the most important questions that has come before the court.

F. W. GRINNELL.

TAXATION OF "INCOME" IN THE ABSTRACT.

THE OPINION OF THE SUPREME COURT OF THE UNITED STATES IN TAFT *v.* BOWERS.

(From the "United States Daily" of February 19, 1929.)

TAFT, PETITIONER, *v.* BOWERS

The full text of the opinion of the Court, delivered by Mr. Justice McReynolds, follows:

Petitioners, who are donees of stocks, seek to recover income taxes exacted because of the advancement in the market value of those stocks, while owned by the donors. The facts are not in dispute.

Both causes must turn upon the effect of paragraph (2), Sec. 202, Revenue Act, 1921, (c. 136, 42 Stat. 227) which prescribes the basis for estimating taxable gain when one disposes of property which came to him by gift. The records do not differ essentially and a statement of the material circumstances disclosed by No. 16 will suffice.

During the calendar years 1921 and 1922 the father of petitioner, Elizabeth C. Taft, gave her certain shares of Nash Motors Company stock, then more valuable than when acquired by him. She sold them during 1923 for more than their market value when the gift was made.

The United States demanded an income tax reckoned upon the difference between cost to the donor and price received by the donee. She paid accordingly and sued to recover the portion imposed because of the advance in value while the donor owned the stock. The right to tax the increase in value after the gift is not denied.

Abstractly stated, this is the problem—

In 1916 A purchased 100 shares of stock for $1,000 which he held until 1923 when their fair market value had become $2,000. He then gave them to B who sold them during the year 1923 for $5,000. The United States claim that under the Revenue Act of 1921 B must pay income tax upon $4,000, as realized profits.

She maintains that only $3,000—the appreciation during her ownership—can be regarded as income; that the increase during the donor's ownership is not income assessable against her within intendment of the Sixteenth Amendment.

The District Court ruled against the United States; the Circuit Court of Appeals held with them.

Act of Congress approved November 23, 1921, Chap. 136, 42 Stat. 227, 229, 237—

Sec. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that * * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof.

If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;

Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (a) of section 212, any such amounts are to be properly accounted for as of a different period; but

(a) Does not include the following items, which shall be exempt from taxation under this title; * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income).

We think the manifest purpose of Congress expressed in paragraph (2), Sec. 202, supra, was to require the petitioner to pay the exacted tax.

The only question subject to serious controversy is whether Congress had power to authorize the exaction.

It is said that the gift became a capital asset of the donee to the extent of its value when received and, therefore, when disposed of

by her no part of that value could be treated as taxable income in her hands.

The Sixteenth Amendment provides:

"The Congress shall have power to lay and collect taxes on incomes from whatever source derived without apportionment among the several States and without regard to any census or enumeration."

Income is the thing which may be taxed—income from any source. The Amendment does not attempt to define income or to designate how taxes may be laid thereon, or how they may be enforced.

Under former decisions here the settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income.

Also, this Court has declared: "Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets." Eisner v. Macomber, 252 U. S. 189, 207.

The "gain derived from capital," within the definition, is "not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested, and coming in, that is, received or drawn by the claimant for his separate use, benefit and disposal." United States v. Phellis, 257 U. S. 156, 169.

If, instead of giving the stock to petitioner, the donor had sold it at market value, the excess over the capital he invested (cost) would have been income therefrom and subject to taxation under the Sixteenth Amendment. He would have been obliged to share the realized gain with the United States. He held the stock—the investment—subject to the right of the sovereign to take part of any increase in its value when separated through sale or conversion and reduced to his possession.

Could he, contrary to the express will of Congress, by mere gift enable another to hold his stock free from such right, deprive the sovereign of the possibility of taxing the appreciation when actually severed, and convert the entire property into a capital asset of the donee, who invested nothing, as though the latter had purchased at

the market price? And after a still further enhancement of the property, could the donee make a second gift with like effect, etc.? We think not.

In truth the stock represented only a single investment of capital—that made by the donor. And when through sale or conversion the increase was separated therefrom, it became income from that investment in the hands of the recipient subject to taxation according to the very words of the Sixteenth Amendment.

By requiring the recipient of the entire increase to pay a part into the public treasury, Congress deprived her of no right and subjected her to no hardship. She accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor. When she sold the stock she actually got the original sum invested, plus the entire appreciation and out of the latter only was she called on to pay the tax demanded.

The provision of the statute under consideration seems entirely appropriate for enforcing a general scheme of lawful taxation. To accept the view urged in behalf of petitioner undoubtedly would defeat, to some extent, the purpose of Congress to take part of all gain derived from capital investments. To prevent that result and insure enforcement of its proper policy, Congress had power to require that for purposes of taxation the donee should accept the position of the donor in respect of the thing received. And in so doing, it acted neither unreasonably nor arbitrarily.

The power of Congress to require a succeeding owner, in respect of taxation, to assume the place of his predecessor is pointed out by United States v. Phellis, 257 U. S. 156, 171—

"Where, as in this case, the dividend constitutes a distribution of profits accumulated during an extended period and bears a large proportion to the par value of the stock, if an investor happened to buy stock shortly before the dividend, paying a price enhanced by an estimate of the capital plus the surplus of the company, and after distribution of the surplus, with corresponding reduction in the intrinsic and market value of the shares, he were called upon to pay a tax upon the dividend received, it might look in his case like a tax upon his capital. But it is only apparently so.

"In buying at a price that reflected the accumulated profits, he of course acquired as a part of the valuable rights purchased the prospect of a dividend from the accumulations—bought 'dividends on' as the phrase goes—and necessarily took subject to the burden of the income tax proper to be assessed against him by reason of the

dividend if and when made. He simply stepped into the shoes, in this as in other respects, of the stockholder whose shares he acquired, and presumably the prospect of a dividend influenced the price paid, and was discounted by the prospect of an income tax to be paid thereon.

"In short, the question whether a dividend made out of company profits constitutes income of the stockholder is not affected by antecedent transfers of the stock from hand to hand."

There is nothing in the Constitution which lends support to the theory that gain actually resulting from the increased value of capital can be treated as taxable income in the hands of the recipient only so far as the increase occurred while he owned the property. And Irwin v. Gavit, 268 U. S. 161, 167, is to the contrary.

The judgment below is affirmed.

The Chief Justice took no part in the consideration or decision of these causes.

February 18, 1929.

COMMENT.

Q. E. D. ?

The Court says that under the Sixteenth Amendment "income is the thing to be taxed—income from any source." But the amendment does not say "income," in the abstract, it says "incomes" *i. e. the* incomes of individuals. The Court refers to "the settled doctrine that . . . the amendment confers no power . . . to define and tax as income . . . something which theretofore could not have been properly regarded as income." Could the increase in value of property while in the hands of a donor be "properly regarded as income" of the donee before the amendment? We fail to see how the quotations from U. S. V. Phellis bear on the question in the Bowers Case. The Federal Income Tax Law *excludes* from "gross income" "the value of property acquired by gift, bequest, devise or inheritance" and then turns about and "defines and taxes" *part* of the value at the time of a gift of "property acquired by gift," which would seem to be something that could not have been "properly regarded as income" of the donee before the Sixteenth Amendment.

The opinion seems typical of the bog of arbitrary rules inevitably connected with so-called "evasion" taxes. The Sixteenth Amendment did not authorize Congress to tax whatever it might please to call "evasion." The opinion of Judge Knox of the Federal District Court in New York (15 Fed. 2nd 890) which was reversed seems to us by far the more convincing opinion.

F. W. G.

LAW OBSERVANCE, LAW ENFORCEMENT AND THE LIMITS OF EFFECTIVE LEGAL ACTION.

Introductory Statement.

The President's address to the representatives of the Associated Press on April 21, 1929, is a challenge to the country and the bar to think harder than heretofore about law and what have been described as "the limits of effective legal action". Accordingly, we reprint his address for convenient reference. While this number was going to press, the membership of the committee referred to in the address has been announced by the President.

The purpose of the committee, as we understand it, is primarily the study of federal administrative problems. Accordingly, we reprint herewith a communication received from the President and Secretary of the Association of the Bar of the City of New York in regard to proposed legislation relative to the federal courts now pending before Congress.

While the inquiry is in no sense limited to the prohibition law, yet, as some of the most serious problems of the federal courts have arisen as a result of that law, they must necessarily be studied. There is so much heat on both sides of the prohibition question that it is not always easy for men to discuss it or think about it calmly. The President's address reflects forcibly the arguments in favor of law enforcement.

Since his address, several thoughtful discussions have appeared suggesting human limitations to legal possibilities. As they express serious convictions and will help to focus attention on parts of the problem to be studied, we reprint, without comment, an article by Professor Binkley, of New York University, on, "Nullification and the Legal Process," which appeared in *The New Republic* of May first; an account of the English experience with tobacco smuggling in the seventeenth and eighteenth centuries, by Mr. Worthington C. Ford, of the Massachusetts Historical Society, which appeared in *The Boston Herald*. We also print here a discussion of the suggestion that the federal padlock law should be enforced through the state courts. The late James C. Carter, in his volume of lectures entitled, "Law, its Origin, Growth and Function," expressed some thoughtful views, on pages 205 and 247 et seq., as to the human

limitations of legal action (See also, William G. Sumner's "Folkways", §118, p. 115).

Turning to another aspect of the administrative problem in the federal courts, we call attention to the address of Hon. James M. Morton, Jr., relative to, "First Instance Courts of General Jurisdiction," in the MASSACHUSETTS LAW QUARTERLY for August, 1925, page 1, and the note on the practical results of the theoretical reasoning of the federal courts about jury trial as a jurisdictional requirement in criminal cases in the same number at page 16. See also MASSACHUSETTS LAW QUARTERLY for May, 1924, pages 53-61. The volume by Professor Frankfurter and Professor Landis on "The Business of the Supreme Court of the United States," contains much information in regard to the federal courts. A discussion of the rulemaking power of the courts by various representatives of the Conference of Bar Association Delegates appears in the "American Bar Association Journal" for March, 1927, Part II. Special attention is here called to the suggestion on page 10 of that discussion, that representatives of the federal bar should be added to the periodical judicial conference of federal judges. F. W. G.

PRESIDENT HOOVER'S ADDRESS BEFORE THE ASSOCIATED PRESS IN NEW YORK, APRIL 21, 1929.

(From the "Boston Transcript" of April 22, 1929.)

Members and friends of the Associated Press: I have accepted this occasion for a frank statement of what I consider the dominant issue before the American people. Its solution is more vital to the preservation of our institutions than any other question before us. That is the enforcement and obedience to the laws of the United States, both Federal and State.

I ask only that you weigh this for yourselves, and if my posi tion is right, that you support it—not to support me, but to support something infinitely more precious—the one force that holds our civilization together—law. And I wish to discuss it as law, not as to the merits or demerits of a particular law, but all law, Federal and State, for ours is a Government of laws made by the people themselves.

A surprising number of our people, otherwise of responsibility in the community, have drifted into the extraordinary notion that laws are made for those who choose to obey them, and in addition,

our law-enforcing machinery is suffering from many infirmities arising out of its technicalities, its circumlocutions, its involved procedures, and too often, I regret, from inefficient and delinquent officials.

We are reaping the harvest of these defects. More than nine thousand human beings are lawlessly killed every year in the United States. Little more than half as many arrests follow. Less than one-sixth of these slayers are convicted, and but a scandalously small percentage are adequately punished. Twenty times as many people in proportion to population are lawlessly killed in the United States as in Great Britain. In many of our great cities, murder can apparently be committed with impunity. At least fifty times as many robberies in proportion to population are committed in the United States as in Great Britain, and three times as many burglaries.

Even in such premeditated crimes as embezzlement and forgery our record stands no comparison with stable nations. No part of the country, rural or urban, is immune. Life and property are relatively more unsafe than in any other civilized country in the world, in spite of all this we have reason to pride ourselves on our institutions and the high moral instincts of the great majority of our people. No one will assert that such crimes would be committed if we had even a normal respect for law and if the laws of our country were properly enforced.

In order to dispel certain illusions in the public mind on this subject, let me say at once that while violations of law have been increased by inclusion of crimes under the Eighteenth Amendment and by the vast sums that are poured into the hands of the criminal classes by the patronage of illicit liquor by otherwise responsible citizens, yet this is but one segment of our problem. I have purposely cited the extent of murder, burglary, robbery, forgery and embezzlement, for but a small percentage of these can be attributed to the Eighteenth Amendment. In fact, of the total number of convictions for felony last year, less than 8 per cent came from that source. It is, therefore, but a sector of the invasion of lawlessness.

What we are facing today is something far larger and more fundamental—the possibility that respect for law as law is fading from the sensibilities of our people. Whatever the value of any law may be, the enforcement of that law written in plain terms upon our statute books is not, in my mind, a debatable question. Law should be observed and must be enforced until it is repealed by

the proper processes of our democracy. The duty to enforce the law rests upon every public official and the duty to obey it rests upon every citizen.

No individual has the right to determine what law shall be obeyed and what law shall not be enforced. If a law is wrong, its rigid enforcement is the surest guaranty of its repeal. If it is right, its enforcement is the quickest method of compelling respect for it. I have seen statements published within a few days encouraging citizens to defy a law because a particular journal did not approve of the law itself. I leave comment on such an attitude to any citizen with a sense of responsibility to his country.

In my position, with my obligations, there can be no argument on these points. There is no citizen who would approve of the President of the United States assuming any other attitude. It may be said by some that the larger responsibility for the enforcement of laws against crime rests with State and local authorities and it does not concern the Federal Government. But it does concern the President of the United States, both as a citizen and as the one upon whom rests the primary responsibility of leadership for the establishment of standards of law enforcement in this country. Respect for law and obedience to law does not distinguish between Federal and State laws—it is a common conscience.

After all, the processes of criminal-law enforcement are simply methods of instilling respect and fear into the minds of those who have not the intelligence and moral instinct to obey the law as a matter of conscience. The real problem is to awaken this consciousness, this moral sense, and if necessary to segregate such degenerate minds where they can do no further harm.

We have two immediate problems before us in government: To investigate our existing agencies of enforcement and to reorganize our system of enforcement in such manner as to eliminate its weaknesses. It is the purpose of the Federal Administration systematically to strengthen its law-enforcement agencies week by week, month by month, year by year, not by dramatic displays and violent attacks in order to make headlines, not by violating the law itself through misuse of the law in its enforcement, but by steady pressure, steady weeding out of all incapable and negligent officials no matter what their status; by encouragement, promotion and recognition for those who do their duty; and by the most rigid scrutiny of the records and attitudes of all persons suggested for appointment to official posts in our entire law-enforcement ma-

chinery. That is administration for which my colleagues and I are as fully responsible as the human material which can be assembled for the task will succeed. Furthermore, I wish to determine and, so far as possible, remove the sources of inherent defects in our present system that defeat the most devoted officials.

Every student of our law-enforcement mechanism knows full well that it is in need of vigorous reorganization, that its procedure unduly favors the criminal; that our judiciary needs to be strengthened; that the methods of assembling our juries needs revision; that justice must be more swift and sure. In our desire to be merciful the pendulum has swung in favor of the prisoner and far away from the protection of society. The sympathetic mind of the American people in its over-concern about those who are in difficulties has swung too far from the family of the murdered to the family of the murderer.

With a view to enlisting public understanding, public support, accurate determination of the facts, and constructive conclusions, I have proposed to establish a national commission to study and report upon the whole of our problems involved in criminal-law enforcement. That proposal has met with gratifying support, and I am sure it will have the co-operation of the bar associations and crime commissions in our various States in the widespread effort now being made by them. I do not propose to be hasty in the selection of this commission. I want time and advice, in order that I may select high-minded men, impartial in their judgment, skilled in the science of the law and our judicial system, clear in the conception of our institutions. Such a commission can perform the greatest service to our generation.

There is another and vastly wider field than the nature of laws and the methods of their enforcement. This is the basic question of the understanding, the ideals, the relationship of the individual citizen to the law itself. It is in this field that the press plays a dominant part. It is almost final in its potency to arouse the interest and consciousness of our people. It can destroy their finer sensibilities or it can invigorate them. I am well aware that the great majority of our important journals day by day give support to these high ideals.

I wonder, sometimes, however, if perhaps a little more support to our laws could not be given in one direction. If, instead of the glamour of romance and heroism, which our American imaginative minds too frequently throw around those who break the law, we

would invest with a little romance and heroism those thousands of our officers who are endeavoring to enforce the law, it would itself decrease crime. Praise and respect for those who properly enforce the laws would help. Perhaps a little better proportioned balance of news concerning those criminals who are convicted and punished would serve to instill the fear of the law.

I need not repeat that absolute freedom of the press to discuss public questions is a foundation stone of American liberty. I put the question, however, to every individual conscience, whether flippance is a useful or even legitimate device in such discussions. I do not believe it is. Its effect is as misleading and as distorting of public conscience as deliberate misrepresentations. Not clarification, but confusion of issues arises from it.

Our people for many years have been intensely absorbed in business, in the astonishing upbuilding of a great country, and we have attempted to specialize in our occupations, to strive to achieve in our own specialties and to respect competency of others in theirs. Unconsciously, we have carried this psychology into our state of mind toward government. We tend to regard the making of laws and their administration as a function of a group of specialists in government whom we hired for this purpose and whom we call public servants. After hiring them it is our purpose casually to review their actions, to accept those which we approve and to reject the rest.

This attitude of mind is destructive of self-government, for self-government is predicated upon the fact that every responsible citizen will take his part in the creation of law, the obedience to law and the selection of officials and methods for its enforcement.

Finally, I wish again to reiterate that the problem of law enforcement is not alone a function or business of government. If the law can be upheld only by enforcement officers, then our scheme of government is at an end. Every citizen has a personal duty in it—the duty to order his own actions, to so weigh the effect of his example, that his conduct shall be a positive force in his community with respect to the law.

I have no criticism to make of the American press. I greatly admire its independence and its courage. I sometimes feel that it could give more emphasis to one phase or another of our national problems, but I realize the difficulties under which it operates. I am wondering whether the time has not come, however, to realize that we are confronted with a national necessity of the first degree,

that we are not suffering from an ephemeral crime wave but from a subsidence of our foundations.

Possibly the time is at hand for the press to systematically demand and support the reorganization of our law-enforcement machinery—Federal, State and local—so that crime may be reduced, and on the other hand to demand that our citizens shall awake to the fundamental consciousness of democracy which is that the laws are theirs and that every responsible member of a democracy has the primary duty to obey the law. It is unnecessary for me to argue the fact that the very essence of freedom is obedience to law; that liberty itself has but one foundation, and that is in the law.

And in conclusion let me recall an oft-repeated word from Abraham Lincoln whose invisible presence lives hourly at the very desk and in the very halls which it is my honor to occupy:

"Let every man remember that to violate the law is to trample on the blood of his father, and to tear the character of his own and his children's liberty. Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap. Let it be taught in the schools, in seminaries, in colleges. Let it be preached from the pulpit, proclaimed in the legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation, and let the old and the young, the rich and the poor, the grave and the gay of all sexes and tongues and colors and conditions sacrifice unceasingly upon its altar."

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

CHARLES H. STRONG
SECRETARY

OFFICE OF THE SECRETARY
42 WEST 44TH STREET
NEW YORK, N. Y.

MARCH 11TH, 1929

SECRETARY MASSACHUSETTS BAR ASSOCIATION,
60 State St., Boston, Mass.

DEAR SIR:

In December, 1927, this Association's Special Committee on Congested Calendars made a report on "Facilitating the handling and disposition of criminal cases in Federal courts". This was printed in the 1928 Year Book of this Association at pp. 329-354 and in the 1928 Report of the American Bar Association at pp. 439-456. At the first session of the 70th Congress bills for carrying out the recommendations were introduced. Between January 17 and April 25, 1928, the House Judiciary Committee held hearings on these and other bills relating to the same general purpose. Dur-

ing the course of the hearings some of the principal features advocated by this Association were combined into H. R. 10639 (of which copy is enclosed). Since then attention has been concentrated on that bill. It has been approved by the American Bar Association, the Federal Bar Association, the New York State Bar Association and other organizations. The resolution of the American Bar Association is at p. 101 of its 1928 report and a copy of the resolution of the New York State Bar Association is enclosed.

Upon the convening of the next regular session of Congress, the friends of H. R. 10639 hope to procure a resumption of the hearings on it by the House Judiciary Committee. Its essential provisions are (a) authorization of voluntary waiver of jury trials in criminal cases; (b) empowering the court to employ United States commissioners to hear and report on certain misdemeanor cases in substantially the same way that special masters, referees, commissioners and auditors are now availed of in civil cases; and (c) dispensing with the necessity of the United States Attorney procuring advance leave of court to file information in cases which existing law permits to be prosecuted in that form.

In the Southern District of New York the consensus of opinion among present and former judges, prosecuting officers, court clerks, United States commissioners and lawyers, who have given attention to the subject, is that the enactment of the bill would probably reduce by half the time of the judges of the United States District Court now devoted to criminal cases and would probably save upwards of $30,000 annually in the expenses of conducting the court.

By direction of the Executive Committee of this Association the matter is brought to your attention. It is hoped that, in advance of the next regular session of Congress, you will give consideration to the bill, with the view of determining whether you are willing to join in advocating it.

Through Senators or Congressmen from your State doubtless you can obtain copies of the printed hearings before the House Judiciary Committee. We shall also be glad to correspond with you and to furnish you whatever additional material we have available.

Yours very truly,

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Yours very truly,

CHARLES E. HUGHES, *President.*
CHARLES H. STRONG, *Secretary.*

RESOLUTION

Adopted by New York State Bar Association at its annual meeting January 19, 1929.

RESOLVED by the New York State Bar Association

(1) That this Association favors legislation granting (a) to an accused in the United States district court the right voluntarily to waive a jury trial and to elect to be tried by the court without a jury; (b) to the court authority, under rules made by it, to employ United States commissioners to hear and report on misdemeanor cases and to recommend sentences therein when defendants voluntarily submit to that procedure, provided, when they plead not guilty, their right to a court trial, if they desire it, after knowledge of the report and recommendation, shall be fully preserved; and (c) to the United States attorney authority, without the necessity of procuring previous leave of court, to file an information in any case which existing law permits to be prosecuted in that form.

(2) That the Association urges passage by Congress of the bill pending before it, designated as H. R. 10639, for accomplishing the foregoing purposes.

THE JONES-STALKER ACT.

[PUBLIC—No. 899—70TH CONGRESS]

[S. 2901]

An Act To amend the National Prohibition Act, as amended and supplemented.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 1, Title II, of the National Prohibition Act, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.

SEC. 2. This Act shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense now provided by the said National Prohibition Act.

Approved, March 2, 1929.

NULLIFICATION AND THE LEGAL PROCESS.

(Reprinted by Permission from "The New Republic" of May 1, 1929.)

The aphorism that disrespect for one law leads to contempt for all is equally useful to the drys, who argue that unrepealable laws should be enforced, and to the wets, who argue that unenforceable laws should be repealed. It was given expression in the President's inaugural address:

> Our whole system of self-government will crumble either if the officials elect what laws they will enforce or the citizens elect what laws they will support. The worst evil of disregard for some laws is that it destroys respect for all law.

This statement raises a double question: on the one hand, is a margin of variation in enforcement consistent with self-government; and on the other, is the violation of unpopular or obsolete laws just as reprehensible as the breaking of laws that have the moral conviction of the whole community behind them? Is the nullification of a law to be regarded as a socially useful part of the total legal process, like repeal, or as mere law-breaking?

To the first half of each of these questions, which touch the foundations of government and human individuality, the partisans of enforcement return an impulsive and uncritical no: there must be no margin of variation permissible, and no difference between nullification and violation. But if we analyze this answer, we discover that it is merely a bit of doctrinaire guesswork, springing from a faulty understanding of our history, an artificial picture of our legal system, and a purely imaginary notion of human nature.

The theory that self-government is doomed when officers and citizens decide which laws are to be enforced is based upon a discredited view of free government: the doctrine of the separation of powers. This doctrine is a relic of eighteenth-century rationalism. It originated in Montesquieu's misunderstanding of the government of England. It has no roots in our history, but only in a foreigner's misconception of our institutions. It was a fashionable political dogma at the time the American Constitution was drawn up, but it was not then, and is not now, realized in the actual working of local government in Anglo-Saxon countries. And in these the local government takes care of most of the enforcement of criminal law.

According to the theory of the separation of powers, people can be assured of self-government only when their officials enforce blindly whatever laws their legislatures enact. There is no short-circuit allowed from people to administration. The popular will must be expressed through the legislature or not at all.

If this bookish doctrine were true, the only units of population that could make their will felt in public affairs would be those that happened to have sovereign legislative bodies. The smaller units, which take care of the enforcing of the law, would have only as much room for choice as the sovereign specifically allowed them. The law expressed by the legislature would be the "command of the sovereign," and aside from specific delegations of powers, there would be no elasticity or local variation in carrying out the sovereign's commands.

But the government that lives outside of books takes its course without much regard for the metaphysical thing called sovereignty or the precious distinction between legislation and enforcement.

Everyone knows that, in American politics, law-enforcement policies are openly voted upon in municipal elections. If the party that advocates strict law enforcement is defeated at the polls, those who are elected to office have a mandate from the voters to nullify certain of the laws enacted by the sovereign legislative authority. This control of the policy to be followed by local officials is an inherent part of the total legal and political process.

Prosecuting officials are equally sensitive to local pressure. In Kansas City, they secure conviction in one-third of one percent of the cases of arrest for liquor-law violation; in the rural districts near by, they convict 25 percent of the persons arrested. The judges in one region sentence a prohibition offender as if his crime were as serious as forgery; elsewhere they treat him like a careless motorist. All this goes on openly, the judges announcing in advance what punishments they will inflict. And back of all these permanent officials, there are the temporary instruments of enforcement, the members of the juries and grand juries. If they refuse to indict and convict, enforcement is impossible. The command of the sovereign goes unheeded.

From the standpoint of the abstract doctrine of the separation of powers, this margin of local freedom is no doubt a deplorable anomaly. From the point of view of the doctrine of sovereignty, it is an inexcusable usurpation. But, actually, these practices conform to the great tradition of Anglo-Saxon self-government.

Through all the changes that have marked the political path of the Anglo-Saxons from the tribal period to the present, local independence applying criminal laws has prevailed.

In the early Anglo-Saxon times each community defined its own law. The king administered justice in a limited class of cases, but it was the local law that governed these cases. By the law of Berkshire, a murderer forfeited life and substance; by the law of Urchenfeld, he was fined 120 shillings. At Lewes, the crime of rape was compounded for eight shillings fourpence; in Worcestershire, it could not be compounded. When, in a later century, Henry II sent his justices through the land, they would inform themselves of the law of the locality, and would base their decisions upon the information they received. Later the royal judges built up a system of law that was common to the whole realm; this was the Common Law of England. But local autonomy was not thereby extinguished: from autonomy in defining the law, it passed over to autonomy in enforcing it.

In the days of Queen Elizabeth, law enforcement was in the hands of the country gentry. From this class were recruited the Justices of the Peace, "full of wise saws and modern instances." Shakespeare knew the type. They enforced as much or as little of the law as they saw fit. If they happened to be strict Calvinists, they might even go beyond the law in trying to force the people of their districts to conform to the Calvinist virtues. They would fine the villagers for shooting at the butts on Sunday. The good Queen would write letters of protest, but she had no way of compelling uniform law enforcement. The local authorities simply nullified the laws that did not please them. This willingness to nullify law came to America in the Mayflower.

In Colonial times, the Navigation Acts were unenforceable in America, the region for which they were intended. Smuggling ranked with other commercial enterprises as an eminently respectable, as well as profitable, occupation. Public opinion sided with the smuggler. Attempts to enforce the law broke down because the local government authorities held the key positions. This story was repeated again and again in the history of our country. As it was with the Fugitive Slave Law in the North before the Civil War, so is it with the Fifteenth Amendment in the South since Hayes' administration.

The autonomy of local government, in matters of criminal law, has not only survived the change from a law-defining to a law-

enforcing function; it has also weathered the transition from the old Anglo-Saxon system to Norman feudalism, from feudalism to squirearchy, and thence to modern popular government with its organized party politics. In the light of this historical perspective, it would appear that the only state wherein local nullification menaces self-government is one that exists in university class-rooms alone. Local discretion in enforcing laws is more clearly a part of our system of self-government than the doctrines of the separation of powers and of sovereignty, in whose names it is condemned.

From the doctrinaire point of view, one might still argue that these local variations are to be regarded merely as violations. This raises the question of the distinction between nullification and violation. What is the law, after all, and how can it cease to be law? If, in the state of New Jersey, the law against larceny is violated, and at the same time the prohibition law, or Sunday theatre law, is disregarded, the doctrinaire will lump all of these offenses together as law-breaking. In assuming this attitude, he deliberately ignores all the elements of the legal situation except the formal facts of statutory enactment.

For the doctrinaire, though he may not know it, believes in the Austinian theory of law. That is to say, he thinks that the law is the command of a sovereign, and the sovereign a determinate organ of the state. The Austinian theory patterns a general definition of law upon the model of the most recent and superficial kind of law—the statute.

As against the Austinian conception, there is the view that law is a product of the internal development of the community, a function of its culture in which the essential element is consensus, not command. According to this more natural and general view, the statutory enactment is only one among many ways in which law is expressed and defined.

The history of law, not only in Germanic lands but in all places whose legal history is known, shows that the earliest law was based on custom, and was thought to be something that no human agency could alter. The legal system was kept up to date by forgetting old laws and remembering new ones into existence. There was no sovereign, no determinate organ, no command.

The invention of writing interfered with this automatic legal system by making it more difficult to forget old laws or unconsciously introduce new ones. When the law was once written down, innovations became conscious. Outright legislation came to be prac-

tised. The consequent revolution in our way of thinking has gone so far that we now look to new law to accomplish just those miracles of beneficence that our ancestors expected of the "good and ancient customs of the realm." While our legislatures grind out volume after volume of new laws, we continue to exclaim of this or that inconvenience, "there ought to be a law about it."

The invention of legislation, however, has not killed the original habit of forgetting an inapplicable law and developing a new consensus as to what is right or wrong. These processes still form a part of the living legal system. There are whole classes of unrepealed statutes which are so obviously obsolete that any attempt to enforce them is regarded as freakish. A grand jury in Elizabeth, New Jersey, refused to indict a theatre owner who was clearly guilty of violating the Sunday closing law, on the ground that "a change in conditions and customs makes the present law governing the moral life on the Sabbath more or less obsolete."

The doctrinaire view of law breaks down when confronted by three important kinds of statutes. Some are obsolete; others are opposed by the consensus of opinion in certain communities within the jurisdiction of the legislature which enacted them; and others are enacted without intention on the part of the legislators that they are to be enforced. With laws of these three kinds the problem of nullification arises. And in each case, the Austinian doctrinaire would claim that the statute is the law; while the student of the practical workings of our jurisprudence would ask whether the statute is actually expressive of the existing law.

To identify nullification with violation of the law is artificial from the standpoint of jurisprudence; from the standpoint of psychology, it is absurd. The statutes that are nullified by obsolescence, local opposition, or lack of serious legislative intent are not confused in the minds of the citizens with the living body of the law. If the community is regularly and wilfully disregarding a law, the most casual conversation of the citizens reveals that the particular statute is distinguished from, not confused with, other elements of the legal system.

With statutes of this type there is no evidence that disrespect for law is transferable from one law to another. The mountaineer who shoots deer out of season does not drop into hog-stealing, nor does the average citizen who carries a hip-flask condone such offenses as arson, highway robbery, or rape. In fact, if the provisions of

the penal code relating to these offenses were repealed, the citizens would continue to regard them as crimes, and would probably devise extra-legal means of preventing them.

The violence that characterizes the bootlegger's trade does not arise from a moral indifference, leading the bootlegger to confuse in his mind the crime of murder and the crime of transporting alcoholic beverages. The violence results merely from the failure of the government to protect an industry that is outlawed by statute. The industry reverts to primitive self-help to protect property rights that cannot be defended in the courts or guaranteed by the police. It was not against the police that the gangsters armed themselves and developed their iron code. Their organization gives a rough and bloody substitute for law in a region from which the law has withdrawn.

The prohibition statute did more than create a new class of crimes; it abolished an old one. It made it illegal to sell, but legal to steal the forbidden liquor. The informal organization of the community then made compensation for the vagaries of the statute. Liquor larceny is still resisted and visited with punishment, though not by the police; the sale of liquor is still permitted, though not by the legislature. The speakeasies of New York often have signs tacked up behind the bar: "This place is insured against theft and dishonesty."

Just as the Volstead Act legalizes deeds that the community continues to regard as theft, so the Jones Act sanctions deeds that the moral sense of the citizens continues to condemn as murder. By increasing the penalty for liquor-law violations, the Jones Law automatically puts the suspected liquor-law violator into the class of the suspected felon. An officer who witnesses the commission of the felony of transporting liquor—were it only in a hip flask—acquires at once the technical rights over the person of the offender that would be acquired by an officer who witnessed a burglary. If the felon flees, refusing to halt when called upon to do so in the name of the law, the officer may kill him. The law will describe the deed as justifiable or excusable homicide. It may happen that the victim flees because he wrongly believes the pursuing officer to be a thug. Even this circumstance may not make the homicide a crime. But such acts, though legalized by statute, will be resented by the community as if there were no statute. A community terrorized by repeated outrages of this kind would probably develop such a tem-

per that juries would acquit persons who killed prohibition-enforcement officers, or the offending officials might be subjected directly to mob vengeance. Fortunately, the adjustment of law enforcement to public sentiment takes place by way of the autonomy of the local community and nullification of the statute. The legislature cannot really give effect to its formal act to legalize murder, any more than it can make effective its enactment to legalize theft.

This experience with prohibition seems to demonstrate that there is something in the nature of law that a log-rolling legislature cannot touch by means of a statutory enactment. But the doctrinaire will still bring forth the objection that if everyone chooses which laws he will obey, the consequence is anarchy.

This is another of the objections based upon fiction—in this case, a fictitious notion of human nature. For human beings are not rational atoms, each utterly independent of the other and capable of entertaining any view believing any doctrine, upholding any cause, that a speculative mind might invent for him. The opinions of men cannot be plucked up arbitrarily from their deep background. The same resistance that is offered to an unconsidered legislative act will also check these supposed attempts towards an anarchistic choice of laws to be obeyed or ignored.

The problem of law enforcement is so serious that we cannot afford to let our thought upon it derive from discredited doctrines of politics and law, or from fictitious notions of human nature. The claim that disregard for one law induces contempt for all is misleading both as to the nature of law and the facts of human behavior. Just as the logicians of Galileo's day argued that there could be no mountains on the moon, since the moon was a heavenly body, the heavenly bodies were perfect, and the form of perfection was a sphere, so the contemporary doctrinaire contends that there is no such thing as justifiable nullification, since the law is what is enacted by the legislature, the legislature is the voice of the sovereign, and the sovereign cannot be guilty of self-contradiction.

No wise or practical policy towards legal reform is likely to arise from a theory that does not take account of justifiable nullification as an inherent feature of the total legal and political process.

ROBERT C. BINKLEY.

TOBACCO SMUGGLING IN ENGLAND IN THE 17TH AND 18TH CENTURIES.

By Worthington C. Ford.

(From the Boston Herald of May 3, 1929.)

There exists no little confusion on the enforcement of the prohibition laws. To say that the constitution imposes prohibition is no more final than to say 70 years ago that the constitution obliged the rendition of fugitive slaves. To assert that a state must provide the means of enforcing prohibition is to excite a discussion which leads nowhere. The letter of the law may be unmistakable; its enforcement becomes doubtful when it runs counter to public opinion. Nor need one raise the question of morality. A gallon of gin is not comparable to a runaway slave. Good reasons existed for banning the gin and upholding the slave. In practice, there is a near parallel in the British attempt to regulate the importation of tobacco, as outlined by Mr. Alfred Rive of Yale University.

First they imposed a heavy duty, so out of proportion to the cost of the article that it encouraged smuggling. Stolen and uncustomed tobacco was sold at prices ruinous to the licensed apothecaries and grocers who carried tobacco among their wares. To favor her colonies, Great Britain prohibited the importation of Spanish tobacco. That led to the Spanish product being taken to the Bermudas to be thence shipped to England as British tobacco. As at present, the West India islands offered good distributing centres for contraband in colonies and mother country. Searchers and informers practised violence and fraud without bettering the situation. In the face of penalties and rewards smuggling increased and the small operator gained, as the cost of law process forbade action against the large number of those bringing in small lots. The government discovered that it was more costly to attempt to reach them than to permit the smuggling.

Sailors in the plantation trade brought in loose bundles of tobacco which were carried from shop to shop at easy rates, so easy that in London the price would not have paid the duty. Landing anywhere in England, the product found its way to the larger cities and towns. An increase of customs officers only increased the resentment against the tax system. The prevalence of smuggling was due to the public sympathy being on the side of the smuggler and against the customs officer. A whole town, the minister included, would turn out to aid in landing a cargo of tobacco—or

forbidden spirits. New regulations led to new evasions. Tobacco openly imported into English warehouses, received a drawback when withdrawn—to be landed illegally in England. Confiscation of horses, wagon or ship worked no cure, for the percentage of ventures lost by discovery was small. Officials took bribes and connived with the smuggler, arranging seizures and dividing the rewards. Early in the 18th century some smugglers turned pirates and plundered incoming ships of their tobacco. In the country and in London itself regular "gangs" formed, originally to receive and distribute the stuff to customers, later to terrorize the countryside. These gangs contained outlaws wanted for other crimes, men reckless of danger and merciless in action. They even had agents among the officers, who warned them of intended raids and exerted influence to prevent prosecution. No judge would convict for fear of reprisals and troops sent against them caused no fear among them. Changes in the laws, increased regulation, government supervision of manufacture and transportation of tobacco were not as potent in improving conditions as the reorganizing of the customs service and the appointment of better grades of officials.

The attitude taken by the public is no novelty. "It has never been considered a serious matter to evade the customs," writes Mr. Rive, "nor is it today." Under the most liberal trade system in existence, the few articles taxed lead to illegal methods. Lord Holland in 1805 confessed that "all that the Legislature can do is to compromise with a crime of which, whatever laws may be made to constitute it a high offence the mind of man can never conceive as at all equalling in turpitude those acts which are breaches of clear moral virtue." A higher authority, Adam Smith, is more sweeping. Not many persons, he wrote, are scrupulous about smuggling, when, without perjury, they are given an opportunity. To pretend to have any scruples against buying smuggled goods would, he thought, "in most countries be regarded as one of those pedantic pieces of hypocrisy" which would seem only to "expose the person to the suspicion of being a greater knave than most of his neighbors." He almost defends the smuggler who, though blamable for violating the laws, might have been an excellent citizen had not "the laws of his country made that a crime which nature never meant to be so."

Although almost every form of intention, action and consequences in the attempt to reduce the tobacco trade to legal limits can be matched in the present contest against the liquor traffic, nearly all of this regulation was in the 17th and 18th centuries. More than 200 years were required to gain the ascendancy over

illegality, and the worst feature of the contest—the gangs, murder, mutilation of customs officers, piratical deeds—prevailed when the law was most severe.

Two questions have come to the front in this prohibition controversy, quite distinct and of opposite force. Whether to permit liquor to be made, transported and sold and consumed is one issue; the other concerns the laws and sanctions for each act. The progress in the past has everywhere been to mitigate punishments for misdemeanors and crimes. The death penalty once applied to a large number of offences now considered worthy of fine or imprisonment. In our prohibition movement the tendency has been to reverse that course and to impose penalties that shock the general sentiment because they are so disproportioned to the offence. It was not by multiplying or increasing punishments that the tobacco smuggler was practically suppressed, but by reasonable laws honestly administered, effecting a fit balance between the offence and the penalty, one consonant with justice. History can produce many such experiences and the extremists on both sides can ill afford to neglect the lesson they bring.

USE OF THE FEDERAL PADLOCK LAW IN STATE COURTS.

The Attorney General's recent announcement suggesting the use of the federal padlock law in proceedings by state officials in the state courts of Massachusetts raises an interesting question of the extent to which state officials and state courts are required, or permitted, to enforce federal laws, generally and particularly with reference to national prohibition. This question involves consideration of the Constitution of the United States, the National Prohibition Act, and decision of federal and state courts.

The important parts of the Constitution to be considered are Article III, sections 1 and 2, and Article VI.

Article III, section 1, defines the judicial power of the United States. It provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . ."

Article III, section 2, defines the scope of the judicial power as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers, and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Article VI makes the Constitution, and laws of the United States made in pursuance thereof, the supreme law of the land. The provision is as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding."

The following propositions, many of them derived from the exhaustive opinion of Judge Story in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, are well established:

1. The whole judicial power of the United States is vested, either in original or in appellate form, in the courts of the United States.[1]

2. The judicial power extends to all the cases enumerated in Article III, section 2, of the Constitution.[2]

3. In some of the enumerated cases the jurisdiction of the federal courts under the Constitution is exclusive, and in all others may be made so by Congress.[3]

4. State courts have concurrent jurisdiction in all such cases, within the scope of their jurisdiction under state laws, except those cases where the jurisdiction of the federal courts is exclusive.[4]

5. State courts having adequate jurisdiction under state laws are bound to enforce civil rights created by act of Congress, for

[1] *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 331; *In re Loney,* 134 U. S. 372; *Robertson* v. *Baldwin,* 165 U. S. 275, 279.

[2] *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 333.

[3] *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 337; *The Moses Taylor,* 4 Wall. 411, 429; *Claflin* v. *Houseman,* 93 U. S. 130, 136, 137.

[4] *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 337; *Houston* v. *Moore,* 5 Wheat. 1, 27; *Claflin* v. *Houseman,* 93 U. S. 130.

acts of Congress pursuant to the Constitution are the supreme law of the land.[5]

6. The criminal jurisdiction of the United States is lodged exclusively in the federal courts. State courts have no jurisdiction to enforce the penal laws of the United States, and Congress cannot confer such jurisdiction on them.[6]

7. Congress cannot vest judicial power in the courts or judicial officers of the several States, or enlarge, restrict or regulate the jurisdiction of state courts.[7]

8. Congress cannot prescribe or regulate the procedure to be followed or the remedy to be given by state courts in cases involving federal laws, since that would be an assumption of power over the jurisdiction of those courts under state laws.[8]

9. Congress may authorize state officers, tribunals and other instrumentalities to do acts which are incidental to the exercise of the judicial power of the United States, but the giving of such authority imposes no duty to do those acts. It gives merely a choice which the officer or tribunal may accept unless restrained by state laws. These incidental acts include making arrests and commitments, issuing warrants, use of penitentiaries, and naturalization of aliens.[9]

It will be observed that a sharp distinction is to be drawn between cases where the exercise of judicial power is directly involved and cases where it is only incidentally involved. In the former class of cases state courts either have a jurisdiction which they must exercise or have no jurisdiction of the case; in the latter class of cases the state instrumentality authorized by Congress to act may do so or not as it chooses.

The Eighteenth Amendment permits, but does not oblige, the States to aid in the enforcement of national prohibition by appro-

[5] *Claflin* v. *Houseman*, 93 U. S. 130; *Mondou* v. *New York, New Haven & Hartford R. R., (Second Employers' Liability Cases)*, 223 U. S. 1, 55–59; *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211, 222; *Ward* v. *Jenkins*, 10 Met. 583.

[6] *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 337; *Huntington* v. *Attrill*, 146 U. S. 657, 672; *United States* v. *Lathrop*, 17 Johns. 4; *Ward* v. *Jenkins*, 10 Met. 583; *Delafield* v. *Illinois*, 2 Hill (N. Y.) 159, 169; *Ely* v. *Peck*, 7 Conn. 239; *Davison* v. *Champlin*, 7 Conn. 244; *State* v. *Pike*, 15 N. H. 83, 85; *Jackson* v. *Rose*, 2 Va. Cases 34.

[7] *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 330; *Houston* v. *Moore*, 5 Wheat. 1, 27; *Robertson* v. *Baldwin*, 165 U. S. 275, 278; *Keegan* v. *Director General of Railroads*, 243 Mass. 96, 99; *Rushworth* v. *Judges of Hudson Pleas*, 58 N. J. L. 97.

[8] *Prigg* v. *Pennsylvania*, 16 Pet. 539, 614; *Mondou* v. *New York, New Haven & Hartford R. R.*, 223 U. S. 1, 56; *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211; *Rushworth* v. *Judges of Hudson Pleas*, 58 N. J. L. 97.

[9] *Prigg* v. *Pennsylvania*, 16 Pet. 539, 622; *United States* v. *Jones*, 109 U. S. 513, 519, 520; *Robertson* v. *Baldwin*, 165 U. S. 275, 279, 280; *Ex parte Gist*, 26 Ala. 156; *Goulis* v. *Judge of District Court*, 246 Mass. 1.

priate legislation.[10] It makes no change in the rules of law defining the limits of the authority and duty of state instrumentalities, such as officers and courts, to participate in the enforcement of acts of Congress. Laws passed in the exercise of the concurrent power of Congress under the Eighteenth Amendment are similar in that respect to other federal laws. In Title II of the National Prohibition Act (U. S. Code, Title 27) Congress has to some extent purported to authorize participation by state officers and courts in its enforcement. The question now to be discussed is how far these state instrumentalities are bound or authorized, under the act and the rules of law applicable to the subject, to take part in the enforcement of that act. The following portions of the act are, or may be, relevant to this inquiry.

Section 2 (U. S. Code, Title 27, section 11), by reference to the general statute concerning arrest and removal for trial, authorizes certain officers, including state magistrates, for crimes or offenses against the United States, to arrest and imprison or bail offenders for trial before United States courts, and to issue search warrants. Under the rule stated above, the authority granted by this provision to state magistrates does not require them to act, but permits them to act if they choose to do so. *Goulis* v. *Judge of District Court*, 246 Mass. 1.

Section 21 (U. S. Code, Title 27, section 33) declares the premises where intoxicating liquor is manufactured, sold or kept in violation of the act, and property used in maintaining the same, to be a common nuisance.

Section 22 (U. S. Code, Title 27, section 34) is the federal padlock law. It provides:

> "An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases."

There are further provisions relative to the procedure to be followed and injunctions and orders to be issued. The court is required, on finding that the material allegations of the petition are true, to order that no liquors shall be manufactured, sold, bartered

[10] *State* v. *Gauthier*, 121 Me. 522; *People* v. *Conti*, 216 N. Y. S. 442.

or stored in the premises, and is authorized to order that the premises shall not be occupied or used for one year thereafter, provided however that the court may, in its discretion, permit the premises to be occupied or used upon giving bond.

Section 24 (U. S. Code, Title 27, section 38), provides for contempt proceedings in case of violation of any injunction, and for the punishment of persons found guilty of contempt.

There are a few instances where proceedings have been undertaken in state courts under the federal padlock law.

In Connecticut it has been held that the state courts have concurrent jurisdiction of actions to abate nuisances as defined in section 21, and that the procedure is governed by section 22. *United States* v. *Stevens,* 103 Conn. 7. The court said that Congress had the right to declare a violation of the act to be a nuisance and to provide that on finding such violation proven the court should order the nuisance abated; that Congress had conferred upon prosecuting officials the power of bringing, and upon state courts of equity the power of hearing and determining, actions to abate such nuisances; that it was their duty to carry out the intention of Congress; and that the fact that the State had failed to provide by statute an equitable remedy did not lessen the duty of state prosecutors and courts to enforce that remedy under the federal law in appropriate cases.

Similarly in New York it has been held that an action under section 22 may properly be brought in the state court in equity, in the name of the United States, by a state district attorney. *United States* v. *Myers,* 215 App. Div. (N. Y.) 624.

In California the court has held that the National Prohibition Act makes premises where liquor is sold a public nuisance subject to abatement and that proceedings may be brought by state attorneys in state courts, in the name of the United States; but that the procedural features of the act are not controlling in the state courts, that the authority for issuance of preliminary injunctions is to be found in the law of the State, and that the provisions for punishment for contempt, being penal, are covered by state law. *Carse* v. *Marsh,* 189 Cal. 743; *In re Brambini,* 192 Cal. 19.

In Missouri the court has held that places where liquor is sold become by the National Prohibition Act public nuisances; that the state courts have jurisdiction to enjoin such nuisances and are bound to exercise that jurisdiction in conformity with the laws of

the State; that Congress cannot compel state courts to assume jurisdiction of actions to enforce the prohibition law or control their modes of procedure. *Ex parte Gounis*, 304 Mo. 428. The court say (p. 444):

> "Where an act of Congress, such as the National Prohibition Act, is designed to suppress a public evil, it is clearly the duty of Congress to provide efficient national instrumentalities, including courts, for its enforcement. It cannot impose that burden or any part of it upon the state courts; nor is there in any case an implication of duty on the part of a state court to lend its jurisdiction to the enforcement of the laws of the United States *in behalf of the United States*. That duty devolves wholly upon the courts of the United States, which were created for the purpose of maintaining in part its sovereign authority.
>
> "The State of Missouri has the power, concurrent with but wholly independent of that conferred upon the United States, to enforce the Eighteenth Amendment, within its boundaries. And this it has undertaken to do. Its Legislature has provided remedies to that end just as complete and just as drastic as those found in the Act of Congress. There is no apparent reason therefore for the State's prosecuting officers to institute, or its courts to entertain, actions under the Federal law for the enforcement of constitutional prohibition. If in the proper exercise of their respective powers and prerogatives they effect enforcement of the state law they will have discharged in full measure the duties severally incumbent upon them in that behalf."

Summarizing the results of these cases briefly, in Connecticut and New York the courts seem to have regarded the federal padlock law as fully operative; in California the court has considered section 21 as operative in declaring the use of property therein described to be a common nuisance, and section 22 as conferring authority on state attorneys to bring suit in state courts, in the name of the United States; in Missouri the court has regarded section 21 as operative, but holds that section 22 is not applicable.

Applying the rules and principles stated above, it seems clear, in the first place, that Congress cannot, as it has attempted to do, authorize state officers to prosecute proceedings to enforce the federal padlock law; for the prosecuting of suits in court is not incidental to the exercise of judicial power, but is a direct exercise of such power,[11] and hence that kind of act does not fall within the

[11] *Robertson* v. *Baldwin*, 165 U. S. 275, 280.

class of cases where state officers may act under federal authority if they choose so to do.

Whether Congress intended to attempt to confer jurisdiction on state courts in such proceedings depends upon the interpretation of the words "may be brought in any court having jurisdiction to hear and determine equity cases." In the cases referred to above it seems to have been assumed that Congress did so intend. If such is the interpretation then again plainly Congress has exceeded its powers, because Congress clearly has no power to confer jurisdiction upon state courts.

There is, however, a real question whether, in view of the provisions of section 21 of the National Prohibition Act, state courts are bound in the exercise of their ordinary jurisdiction to enjoin the use of property declared by section 21 to be a common nuisance, in the absence of state law covering the subject. This depends primarily upon whether section 21 in that respect is to be regarded as a remedial or a penal law. The use of the injunctive process to abate statutory public nuisances, while open to serious objection, seems generally to be held permissible.[12] But on the further question whether a statute declaring property used in a particular way to be a public nuisance and hence subject to abatement by injunction is a penal statute, there is little authority. It is a fundamental maxim that "the courts of no country execute the penal laws of another,"[13] and it is for that reason that the penal laws of the United States are not enforceable in state courts.[14] On principle it would seem that for the purpose of determining whether a law of one sovereignty is enforceable in the courts of another, the distinction should be between laws which create private rights and laws for the protection of the public.

This is the rule given in *Huntington* v. *Attrill*, 146 U. S. 657, where the general question is thoroughly discussed. The court there define the test as follows (p. 668): "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual . . .", and again (pp. 673, 674): "The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question

[12] *Carleton* v. *Rugg*, 149 Mass. 550; *Chase* v. *Proprietors of Revere House*, 232 Mass. 88. Cf. *Murphy* v. *United States*, 272 U. S. 630; *Duignan* v. *United States*, 274 U. S. 195; *Grosfield* v. *United States*, 276 U. S. 494.

[13] Marshall, C. J., in *The Antelope*, 10 Wheat. 66, 123.

[14] *Huntington* v. *Attrill*, 146 U. S. 657, 666, 672.

whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act." And in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 290, it is said "The only cases in which the courts of the United States have entertained suits by a foreign State have been to enforce demands of a strictly civil nature." See also *E. S. Parks Shellac Co.* v. *Harris*, 237 Mass. 312, 318, 319.

In *United States* v. *Stevens, supra*, the court say that the proceeding is civil; but in *Ex parte Gounis, supra*, the court seem to hold the opposite opinion, distinguishing the *Second Employers' Liability Cases*[15] as involving a private right of recovery and not one belonging to the general public.

As to the matter of remedies and procedure under sections 22 and 24, there seems to be no question but that those provisions are not applicable to state courts, being beyond the power of Congress to prescribe. In *Prigg* v. *Pennsylvania*, 16 Pet. 539, 614, Judge Story says: "Every state is perfectly competent and has the exclusive right to prescribe the remedies in its own judicial tribunals, to limit the time as well as the mode of redress, and to deny jurisdiction over cases, which its own policy and its own institutions either prohibit or discountenance." The distinction between laws conferring substantive rights and laws relating to remedies and procedure is fundamental. Like penal laws the latter have no extraterritorial effect.[16]

In Massachusetts we have a state padlock law (St. 1928, chapter 125). This provides for the bringing of a bill in equity in the name of the Commonwealth for the abatement of the use of premises for the illegal keeping, sale or manufacture of intoxicating liquors, as a common nuisance, and authorizes the issuing of an injunction to effect the closing of the premises for one year thereafter, with the proviso that the premises shall not be closed unless it appears that within the preceding three years there have been three convictions for the illegal sale, or keeping, or manufacture of intoxicating liquors upon the premises.

This law differs from the federal law particularly in the requirement that premises shall not be closed unless there have been three convictions within the preceding three years. It is a law prescribing a remedy and the procedure to be followed in Massachusetts courts. It expresses the will of our legislature on that subject.

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[15] *Mondou* v. *New York, New Haven & Hartford R. R.*, 223 U. S. 1.
[16] *Townsend* v. *Jemison*, 9 How. 407, 420; *Taft* v. *Ward*, 106 Mass. 518, 524, 525; *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304; *Gibbs* v. *Howard*, 2 N. H. 296.

It is submitted that state officers will do their full duty in undertaking padlock proceedings if in proper cases they bring suit in the name of the Commonwealth under the state law, that they have no authority to sue in the name of the United States, that the jurisdiction of our state courts in the matter is defined by the state law, and that they are in no respect governed by sections 22 and 24 of the National Prohibition Act.

The question has arisen whether the term "any officer of the law" in section 26 of Title II of the National Prohibition Act (U. S. Code, Title 27, section 40), authorizing searches and seizures, includes state officers. It is settled by *Gambino* v. *United States*, 275 U. S. 310, that the term refers only to federal officers, that state officers are not authorized by the National Prohibition Act to make searches and seizures, and that in so acting they are not agents of the United States. Following this case, in *Marsh* v. *United States*, 29 Fed. 2d, 172, the Circuit Court of Appeals in New York reached the extraordinary conclusion that a state trooper had authority under the state law of New York to search for liquor transported in violation of the National Prohibition Act. While it is clearly established that Congress may authorize state officers to do acts which are incidental to the exercise of judicial power, such as making arrests, searches, etc., thereby appointing them in effect agents of the United States for that purpose, it seems to be equally clear that a state law cannot confer authority on a state officer to exercise powers under federal laws in the absence of any federal authority.

ALEXANDER LINCOLN.

"DRESS REHEARSAL OF DIVORCE CASES."

(From the Boston Post of May 11, 1929)

NOTE.

The bar has long been familiar with occasional stories of dramatic preparation for divorce trials, but, perhaps some of the probate judges, who now hear divorce cases, will be interested in the practical development of the art of preparing for them described in the "Boston Post" as follows: F. W. G.

> "The latest thing in divorce cases is the staging of dress rehearsals before the cases come up in court. At least one prominent Boston attorney, disgusted at the poor showing made on the witness stand by some of his clients, insists on a rehearsal a day or two before the cases are to come up in court.

"He sends his clients to the courthouse for a day to watch how other divorce seekers conduct themselves on the witness stand. He instructs his clients to watch the procedure carefully and to come back to his office for a rehearsal just before the case is scheduled for hearing.

"He has an office rigged up like a courtroom, with a judge's bench and a witness stand. When they appear for rehearsal with extra-short skirts or extra-jazzy clothes which might attract unfavorable attention, he cautions them about wearing modest attire on the day the case is up in court.

"He puts them on the witness stand and goes over the whole case, asking them the very questions which he will put when the case is in court. He corrects wrong answers, warns them against smiling, winking, crossing their legs, chewing gum and making other mistakes which might be detrimental to the case when it is being heard by the judge.

"It all came out when a Post reporter, puzzled by the large number of women spectators who visit the Probate Courts, conducted a quiet investigation and quizzed some of the women. Several of them admitted that they were in court to get "atmosphere" in preparation of their own cases.

"Further investigation revealed that attorneys are behind the practice. One lawyer, who appears frequently in the divorce courts, admitted that he sends his clients to court to observe, and then puts them through a rehearsal. He said that he has lost a number of cases through the ignorance of his witnesses.

"One case, he said, was that of a woman who came to court in an ensemble which would have stopped the horses at a race track, it was so loud. He said he took one look at her in the corridor and knew his case was hopeless. The judge only took one look, he said, and seemed prejudiced against her during the entire hearing.

"Some of his clients, he said, have made a ridiculous showing at the dress rehearsals, but after the coaching have done a good job in testifying when the case came into court. It wins cases for him, he asserts."

"THE MAKING OF THE CONSTITUTION" BY CHARLES WARREN.

Little, Brown & Co.

(Reprinted by permission from the Harvard Graduates Magazine for March, 1929.)

Most of us do not have time to read the scattered sources of information as to the development of the ideas which were finally expressed in the Constitution of the United States. Mr. Warren has

gathered together for us in a single volume preliminary correspondence, contemporary newspaper comment, and the day-to-day development and modification of these ideas during the convention in Philadelphia in 1787, so that we can get a moving picture of that remarkable body. The great character, judgment, and personal influence of Washington loom up in the background. Most of us think of him as the Revolutionary General, or the first President, but we owe as much to his steadying influence as presiding officer of that convention from May 14 to September 18, 1787, as we do to his earlier and later service. Without him nothing would have been accomplished.

We see Madison, thirty-six years old, the constructive thinker and student of the "science of government," acting as a clearing-house of ideas before and during the convention, and "on the job" from beginning to end.

We see the influence of John Adams, the teacher, through his writings, of Madison and other delegates during the preceding ten years or more. Adams was not a member of the convention, being then in London, but his book on "A Defense of American Constitutions" appeared as the convention met and had a profound influence, especially in support of a bicameral legislature instead of a single chamber. Washington's copy of this book, by the way, is in the Boston Athenæum. Washington's answer to Jefferson's later inquiry at breakfast, why a Senate was agreed to, is interesting. Washington asked, "Why did you pour that coffee into your saucer?" "To cool it," replied Jefferson. "Even so," said Washington, "we pour legislation into the senatorial saucer to cool it." Today, some of the heated views of the Senate are "cooled" in the House, but the theory and practice of two houses, instead of one, is as sound as ever, because they help our representatives in Washington to "keep their shirts on."

We see the quieting influence of the venerable Franklin and the reasonableness of Gouverneur Morris, who was the most frequent speaker in the convention; and who, as Madison said, "added to the brilliancy and fertility of his genius—what is too rare—a candid surrender of his opinions when the lights of discussion satisfied him that they had been too hastily formed and a readiness to aid in making the best of measures in which he had been overruled."

Few of us realize today how and why the question of an American monarchy, or a new experiment in republican government hung

in the balance in men's minds, or how many different kinds of apprehensions troubled them at that time. The vast importance of the rule of secrecy as to the deliberations, in affording opportunity for the freest discussion, stands out in bold relief. The importance of this rule, which was adopted early in the sessions, is illustrated by a dramatic scene described by a delegate from Georgia. Early in the sessions some delegate dropped a copy of the propositions before the convention which was picked up and handed to General Washington. Just before putting the question of adjournment for the day, Washington rose and reprimanded the member for his carelessness. "I must entreat gentlemen to be more careful, lest our transactions get into the newspapers and disturb the public repose by premature speculations. I know not whose paper it is, but there it is" (throwing it down on the table). "Let him who owns it take it." "At the same time, he bowed, picked up his hat, and quitted the room with a dignity so severe that every person seemed alarmed. . . . It is something remarkable that no person ever owned the paper." In the middle of July the convention "was scarce held together by the strength of a hair" until the acceptance of the "great compromise" of equal representation in the Senate for both large and small states.

Of course, the story of the gradual acceptance of the ideas which were finally agreed to, involves a certain amount of repetition in letters, speeches, and newspaper accounts, but the repetitions can be skimmed, with a glance, by the reader, and they form part of the background of the great intellectual drama that is presented in this book. The rising generation is impatient with the rhetoric of earlier days and delights in "debunking" history, but there is no "bunk" in this story. James McHenry, in his diary, tells us that after the convention was over, a lady asked Dr. Franklin whether we were to have a monarchy or a republic, and Franklin answered, "A republic if you can keep it." The mass of historical writing which is appearing in books and magazines indicates that more people are reading history than ever before. Mr. Warren's book will help us "to keep the Republic" by showing us, in one volume, how it grew. The history of the Constitution should be studied more in our schools and colleges. Teachers of American history ought to read this book and encourage their pupils to read it when they are old enough.

F. W. Grinnell.

HENRY KING BRALEY.

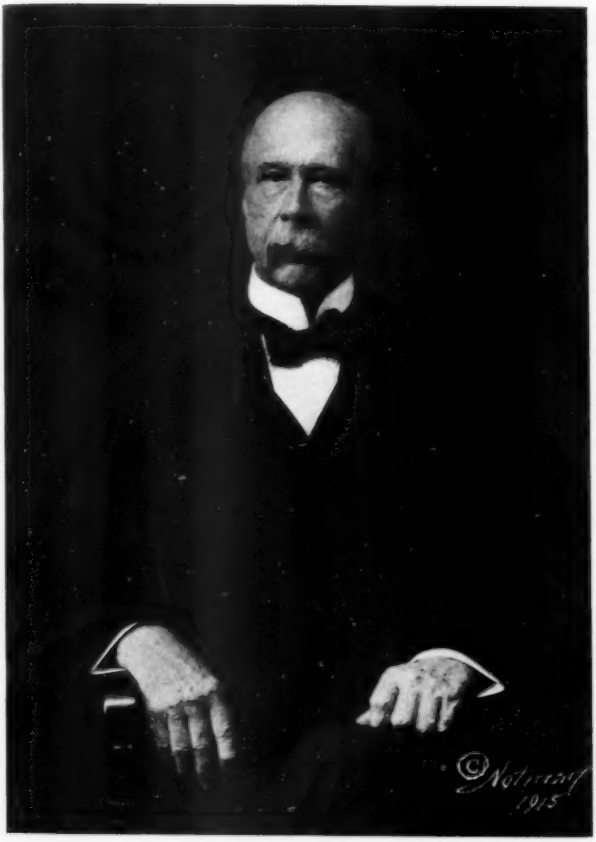
An Appreciation from Edgartown.

The Editor has received the following appreciation of Mr. Justice Braley and his associations with Edgartown:

Henry King Braley, senior associate Justice of the Supreme Judicial Court, died on January 17th, 1929.

Some forty years ago he established a summer home at Edgartown. He had gone to Dukes County, when at the bar, to try cases for men who had sailed with his father on whaling voyages. He sprang from the same stock. The people of the County amongst whom he moved as friend and neighbor loved him. At his death the following tribute was expressed in the columns of the "Vineyard Gazette".

> "Others have paid tribute to the distinguished career of Judge Braley and his qualities upon the bench. His life was long and full of honor, and he died a public figure of fine stature.
>
> We have, though, something further to remember. It was not possible for anyone to live in Edgartown, even for a short period, without knowing of Judge Braley as a summer resident of the town and without feeling that rare pride which the town had in him. There was something about his association with Edgartown which does not often exist and defies accurate characterization; it arose, probably, in the democratic temper of the man. He made one think of the early Americans, eschewing pomp and display, wanting no more than to be a plain man and a neighbor. He reminded one, in an age of lavishness and sensation, that Jefferson rode a mule to the White House and that the true democrat could still exist.
>
> Of his contributions to the Island much might be said. They will be remembered. But, most outstanding of all, was the impress of his character and personality over a long span of years."



HENRY KING BRALEY

"MAJORITY" OPINIONS.

In the Supreme Court of the United States when a decision is not unanimous, it is the practice to state the names of the dissenting justices even if no dissenting opinion is filed. When the Supreme Judicial Court of Massachusetts is not unanimous it is the practice of the court, if no dissenting opinions are filed, to state that the opinion is by the majority of the court, without specifying the names of the dissenting justices. Opinions at the bar have differed as to this practice, which dates back for many years. Some members of the bar have felt that, if the court is divided, it is better that the names of the dissenting judges should be announced according to the practice in Washington.

The present practice, however, was followed as far back as the time of Chief Justice Gray. We are indebted to Roland Gray, Esq., of the Boston Bar, the present possessor of Chief Justice Gray's set of the Massachusetts Reports, for the following marginal notes which are interesting at this date, as a matter of legal history.

ABSTRACT OF NOTES BY MR. JUSTICE GRAY, IN HIS SET OF MASSACHUSETTS REPORTS.

In each of the following cases, where the opinion is said to be that of the majority of the court, the names of the judges below given are respectively noted in the margin as dissenting, in the handwriting of Mr. Justice Gray.

3 Gray 268 at top	Bigelow
99 Mass. 91	Chapman
101 – 52	Gray, Wells
101 – 127	Wells
102 – 508	Morton
103 – 20	Wells
103 – 162	Chapman
105 – 374	"
105 – 408	"
108 – 40	Wells
109 – 408	Morton
113 – 190	Colt, Endicott, Devens
113 – 211	Devens
114 – 304	Gray, Morton, Endicott
118 – 70	Wells
118 – 259	"
118 – 427	Morton
123 – 117	Lord

123 – 311	Gray, Ames, Lord
123 – 488	Soule
125 – 6	Lord
125 – 208	Morton, Endicott, Soule
125 – 592	Ames, Morton
126 – 19	Gray and Soule dissenting, Lord doubting
126 – 287 at top	Ames, Morton, Endicott
127 – 333 "	Endicott, Lord
348	Endicott, Soule
406	Ames, Lord
423	Gray, Soule
449	Endicott, Lord
555 at top	Endicott, Soule
128 – 51	Gray, Soule
129 – 114	Lord
124 at top	"
127 "	"
197	Soule
239	Morton, Lord
501	Gray
558	Gray, Lord
130 – 480	Lord
131 – 102	"
238	Endicott, Lord
406	" "
445 at top	" "
132 – 92	Gray, Soule
138	Lord, Field, Allen
12 Allen, 178	Opinion "By the Court", written by Hoar